Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

GEORGES V. ABI-GHANEM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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167 pp

QUESTIONS PRESENTED

A. When the government requires, as a condition of a plea bargain in a multi-defendant case, that all defendants accept the bargain, must that condition be disclosed to the district court to enable the court to determine whether the plea is knowing and voluntary as required by due process and by Rule 11 of the Federal Rules of Criminal Procedure?

B. When an appellate court has adopted a rule that summary affirmances will not be used in cases presenting issues of first impression, should this Court hold, under its supervisory powers, that the statutory right to an appeal encompasses a right to have the court address an issue of first impression and not dispose of such issues by summary affirmances?

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The petitioner Georges V. Abi-Ghanem respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 21, 1993.

OPINIONS BELOW

The memorandum opinion of the court of appeals, Appendix at 1 (hereafter App:xx), the order of the court of appeals denying a petition for rehearing and a suggestion for rehearing en banc (App: 13), and the district court decision affirmed by the court of appeals (App: 3) are unreported.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2255, the petitioner moved for relief in the United States District Court for the District of Minnesota. On October 30, 1992, that court denied the motion.

On petitioner's appeal, the Eighth Circuit on October 21, 1993, affirmed the judgment of the district court. The Eighth Circuit denied petitioner's petition for rehearing and rejected his request for rehearing en banc on December 6, 1993.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The following provisions are set out in the Appendix (App: 119):

U.S. Const. amend. v

Fed. R. Crim. P. 11

28 U.S.C. § 2255

8th Cir. R. 47B

STATEMENT OF THE CASE

A. The Indictment

Petitioner Georges V. Abi-Ghanem is a naturalized United States citizen. He is an engineer and an accomplished scientist, having received his master's degree in water resource engineering from Stanford University, and his Ph.D. in continuum physics from Princeton University. After he completed his doctoral work, Dr. Abi-Ghanem considered returning to his home in Lebanon. On the advice of Dr. Vietchau Nguyen, however, he decided to move to Minneapolis to work at an environmental consulting company called EWA, Incorporated ("EWA" for earth, wind, and air). Dr. Nguyen was a part-owner of EWA, and he arranged for Dr. Abi-Ghanem's employment with the company.

Dr. Abi-Ghanem was particularly receptive to Dr. Nguyen's advice. He had been Dr. Nguyen's student at Princeton, and Dr. Nguyen had been on Dr. Abi-Ghanem's Ph.D. committee. Dr. Abi-Ghanem looked to Dr. Nguyen as his mentor. He had great respect for Dr. Nguyen, and he felt deep gratitude to him. (8th Cir. Pet. App. 100-08, 136)

The central focus of the indictment that was returned against Dr. Abi-Ghanem and Dr. Nguyen was a contract between EWA and the Yakima Indian Nation ("Yakima Nation"), a Native American tribe in Washington State. The contract arose out of a federal Department of Energy ("Department") proposal that a high-level nuclear waste repository be sited partly on land owned by the Yakima Nation. Under the Nuclear Waste Policy Act of 1982, the Department was required to provide funds to the Yakima Nation so that it could hire its own technical consulting scientists and engineers to monitor the Department's activities at the proposed site. The consultants were to assess both the suitability of the site for a nuclear waste

dump and the effect of the proposed dump on the Yakima Nation, its ceded land, its culture, and its religion. (8th Cir. Pet. App. 94-96)

EWA and the Yakima Nation signed a one-year contract in 1983. The Yakima Nation was very satisfied with EWA's work, and the contract was renewed every year for the following four years. As their work progressed, EWA, and, in particular, Dr. Nguyen, joined by Dr. Abi-Ghanem, became increasingly critical of the Department's view that the proposed site was suitable for a high-level nuclear waste dump. EWA expressed concern that the Department was using falsified data and inappropriate computer software to intentionally underestimate the potential danger that the proposed dump would represent to the surrounding area. In fact, Dr. Nguyen questioned how the Department could ever have considered the site and why millions of dollars had been wasted in considering it.[1]

In an indictment returned in September, 1990, the government alleged that EWA had overbilled the Yakima Nation by $465,291 out of the $4.7 million paid on all of the contracts. Dr. Abi-Ghanem always maintained that the claimed overbillings were more than offset by hours and reports that EWA could have charged to the Yakima Nation, but did not. He also contended (in his § 2255 motion) that the Department found overbillings because it failed to understand the EWA's legitimate billing methods, such as billing work previously performed on a project in the month that the project was completed. (App: 87-88) An independent audit conducted in the last year of the contract found only $2,000 of questionable

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[1] Ultimately, the United States Congress rejected the site as a possible nuclear waste dump.

costs out of a total of more than $1,000,000 paid on the contracts up to that time.[2]

B. The Guilty Plea

Trial on the indictment was set for November 30, 1990. Dr. Abi-Ghanem insisted, as he had throughout the government's investigation, that he was innocent of all wrongdoing. (App: 89, 91) Throughout October and most of November, Dr. Abi-Ghanem's attorney assured him that he believed in his innocence and that he was confident of an acquittal. (App: 91, 101)

1. Two Days Before Trial – the Government Proposes a Plea Bargain, Which Dr. Abi-Ghanem Rejects

In the late morning of November 28, 1990, two days before Dr. Abi-Ghanem's trial was to begin, his attorney told him that the government had approached him with a proposed plea bargain. (App: 96) Dr. Abi-Ghanem did not understand how he could plead guilty or even discuss a plea bargain, since he always had and continued to believe he was innocent. (App: 96) Dr. Abi-Ghanem contacted Dr. Nguyen, who told Dr. Abi-Ghanem that he himself had been advised by his attorney to accept the

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[2] The government also alleged fraud in connection with two contracts between EWA and the Army Corps of Engineers. It claimed that the contracts required that a professional engineer, as certified by the State of Minnesota, perform or supervise the work on the contracts, and that neither Dr. Abi-Ghanem nor Dr. Nguyen was certified as a professional engineer. As to one of the contracts, the government also alleged that EWA misrepresented the number of its full-time employees and their qualifications.

government's offer. (App: 96) This was a radical departure from the previous position of Dr. Nguyen's attorney, who, like Dr. Abi-Ghanem's attorney, had always expressed his belief in the defendants' innocence and his confidence in the outcome of the trial.

After speaking with Dr. Nguyen, Dr. Abi-Ghanem told his own attorney that he wanted to go to trial regardless of what Dr. Nguyen chose to do. (App: 97) In fact, Dr. Abi-Ghanem asked Dr. Nguyen if he would testify for him if he (Dr. Nguyen) did plead guilty, and Dr. Nguyen said he would. (App: 96-97)

2. A Day and a Half Before Trial – Dr. Abi-Ghanem is Told that Dr. Nguyen Cannot Plead Guilty Unless He Pleads Guilty Too

Late in the afternoon of that same day, November 28, Dr. Abi-Ghanem's attorney told him that the government's plea offer required that he and Dr. Nguyen both plead guilty. If both would not plead, the government would withdraw its offer. (App: 97) That is, the plea bargains offered to Dr. Abi-Ghanem and Dr. Nguyen were a package. Both men had to accept the "package plea," or neither could. Despite Dr. Abi-Ghanem's repeated insistence that he wished to go to trial (App: 97), his attorney did not express any dissatisfaction with the government's package plea condition and, despite Dr. Abi-Ghanem's continued requests, made no effort to attempt to convince the government that Dr. Abi-Ghanem should be allowed to go to trial independent of Dr. Nguyen.

3. The Day Before Trial – Dr. Abi-Ghanem Succumbs to the Pressure and Agrees to Plead Guilty

On the morning of November 29, the day before the trial was to begin, Dr. Abi-Ghanem went to his attorney's office and again affirmed his decision to go to trial. (App: 99-100) He believed that he could not prevent his codefendant and mentor, Dr. Nguyen, from accepting the plea offer, and he therefore told his attorney that he wanted his case to be treated separately. The lawyer was not receptive. As Dr. Abi-Ghanem explained in his affidavit in support of his § 2255 motion, "I also knew that he was being discouraged because I have a hard problem which admitted only the following solutions: convince the government to take me to trial or else coerce me to plead guilty." (App: 100)

Dr. Abi-Ghanem called Dr. Nguyen and discussed the matter with him. Dr. Nguyen made it clear that his attorney had told him to accept the offer and that he was going to follow his attorney's instructions. (App: 100) As he had done the day before, Dr. Abi-Ghanem's attorney continued to remind him that unless he pleaded guilty, Dr. Nguyen, who was Dr. Abi-Ghanem's mentor, a member of his Ph.D. committee at Princeton, and his supporter for many years, would not be able to obtain the benefit of government's plea bargain.

Dr. Abi-Ghanem's attorney suggested that they again have a conference telephone call with Dr. Nguyen and his attorney. During the conference call, Dr. Nguyen's attorney told Dr. Abi-Ghanem that the defendants should accept the government's offer, and not go to trial. (App. 100-01) Dr. Abi-Ghanem had worked closely with Dr. Nguyen's attorney to prepare for trial, because many documents crucial to the case were stored in that attorney's office. (App. 95) Dr. Abi-Ghanem was therefore

highly susceptible to pressure from Dr. Nguyen's counsel. Yet his own counsel made no attempt to shield him. (App: 101)

Dr. Abi-Ghanem was very upset and confused because the discussion focused only on his pleading guilty, although he had never suggested either to his own or to Dr. Nguyen's attorney that he was guilty of anything. (App: 101) However, the prosecutor had called several times that day, and had threatened to deport him and to file a multi-million dollar civil lawsuit against him if he did not plead guilty. (App: 102, 8th Cir. Pet. App. 117) In addition, Dr. Abi-Ghanem knew that his attorney had now spent two days discussing the proposed guilty plea instead of preparing for trial, even though there were important documents that the attorney still had not reviewed. (App: 95, 97-98, 102)

Finally, after 4:00 p.m., although he still believed he was innocent and wanted to go to trial, Dr. Abi-Ghanem gave in to the pressure and told his attorney he would plead guilty. (App: 103) He was mentally and emotionally exhausted and felt that he had no choice but to plead guilty. (App: 103) He had done all that he could to save his right to trial, but to no avail. As Dr. Abi-Ghanem's lawyer later wrote to him: "You did not reach your decision to plead guilty until the evening before the day set for trial. Up until that evening, you had been telling me for six months that you were completely innocent of any wrongdoing and that I must diligently prepare the case for trial." (App: 114) The plea offer was sent by telecopier from government counsel to defense counsel at 5:51 p.m. (App: 115)

4. The Plea Proceeding – No One Tells The Court of the "Package Plea" Condition

The following morning, the day set for trial, Dr. Abi-Ghanem met with his counsel at 7:00 a.m. (App: 106) The lawyer reviewed with Dr. Abi-Ghanem what he would have to admit to in order to be permitted to plead guilty. The attorney even prepared a "crib sheet" listing what Dr. Abi-Ghanem would have to admit. (App: 106, 118) Dr. Abi-Ghanem told his attorney that he could not admit to the conduct because it was not true and, as reflected by the copy of the sheet, the attorney crossed out and marked "no" to certain items. (App: 106, 118)

At the change of plea proceeding, Dr. Abi-Ghanem dutifully followed the instructions of his counsel as to how to answer the court's questions. As the transcript of the proceeding illustrates, Dr. Abi-Ghanem politely responded to the court's questions, stating as little as possible. (App: 40) When the court asked the parties about the conditions of the plea agreement, no one told the court that a condition of the plea agreement was that neither defendant could accept it unless both did.

5. The Sentencing

Dr. Abi-Ghanem was sentenced to 18 months of imprisonment on each of the two counts to which he pleaded guilty. The court ordered that he serve the sentences concurrently. (App: 68)

After he entered his plea, Dr. Abi-Ghanem still devoted his time to obtaining and organizing the records that would establish his defense. (App: 109-12) The certified public accounting firm of Boyum & Barenscheer was engaged to independently audit the records for the Yakima Nation contract and verify Dr. Abi-Ghanem's contentions. (App: 94, 110)

C. Subsequent Proceedings

1. The Rule 35 Letter

On August 3, 1991, Dr. Abi-Ghanem, acting without counsel, wrote a letter to the district judge in which he detailed his innocence and explained how he had been coerced into pleading guilty. The district court interpreted the letter as a motion for reduction of sentence under then-applicable Rule 35(b), Fed. R. Crim. P., and denied the motion. (App: 74) Dr. Abi-Ghanem appealed. The Eighth Circuit affirmed in an order filed June 25, 1992.

2. The § 2255 Motion

On June 19, 1992, Dr. Abi-Ghanem, again acting *pro se*, filed a § 2255 motion to vacate his guilty pleas. (App: 76) His principal contention was that his plea was not knowing, intelligent, and voluntary.[3] In addition to submitting the standard § 2255 form, Dr. Abi-Ghanem submitted a separate motion, a supporting memorandum of law, and lengthy, detailed affidavits from himself and Dr. Nguyen. He also submitted documentary exhibits supporting the statements in his affidavit and Dr. Nguyen's affidavit. The exhibits filled an entire filing box, were carefully organized and clearly indexed, and were referenced accordingly in the affidavits and memorandum.

The government filed an opposition to the motion on July 28, 1992. The government submitted no affidavits,

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[3] He also raised other contentions, which are not at issue here.

declarations or other evidentiary material that contradicted Dr. Abi-Ghanem's assertions, relying instead on the plea transcript as grounds for denying Dr. Abi-Ghanem's claims.

In an order dated October 30, 1992, the district court summarily denied the motion. (App: 3) The court misconstrued Dr. Abi-Ghanem's contention regarding the package plea condition and the effect it had on the voluntariness of his plea as an allegation of prosecutorial misconduct. (App: 6) The court's denial did not address or even mention Dr. Abi-Ghanem's contention that his plea was coerced. No evidentiary hearing was conducted.

3. The Appeal

On March 25, 1993, Dr. Abi-Ghanem filed an appeal in the Court of Appeals for the Eighth Circuit of the district court's denial of his § 2255 motion. His chief contention was that the district court was unable to assess the voluntariness of his guilty plea, because the government failed to inform the court of the package condition of the plea agreement. There is no Eighth Circuit law on the issue whether a package plea condition must be disclosed to the district court before a guilty plea is entered. Nevertheless, the Eighth Circuit issued a summary affirmance that cited no law whatsoever, but merely stated, "We have carefully considered Abi-Ghanem's contentions and find them to be without merit. We thus affirm the district court." (App: 2)

4. The Petition for Rehearing

On November 3, 1993, Dr. Abi-Ghanem filed a petition for rehearing with a suggestion for rehearing en banc in the Court of Appeals for the Eighth Circuit. He argued principally that a summary affirmance was impermissible in a case of first impression. The circuit court denied his

petition and rejected the suggestion on December 6, 1993. (App: 13)

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. A "package plea" or "wired plea" condition of a plea bargain is a requirement imposed by the government in a multi-defendant case that all defendants accept the offer. If any of the defendants declines the plea bargain, the government's offer is withdrawn as to all the other defendants. The package plea is a controversial practice because, as courts recognize, it has significant potential for inducing involuntary and false pleas. *See, e.g., United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993); *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990); *United States v. Daniels*, 821 F.2d 76, 80 (1st Cir. 1987). A serious conflict exists among the federal courts of appeal as to whether the package condition of a plea agreement must be disclosed to the district court before the court accepts a guilty plea.

The circuits have taken a number of different positions on whether disclosure is required. Two circuits flatly require that a package condition of a plea agreement be disclosed to the district court prior to the court's decision on the voluntariness of the plea. *See Caro, supra*; *Daniels, supra*. In contrast, the Second Circuit recently concluded that disclosure is the "preferred practice," but is not required. *United States v. Clements*, 992 F.2d 417, 419 (2d Cir. 1993) (per curiam), *cert. denied*, ___ U.S. ___, 114 S. Ct. 316, 126 L.Ed.2d 262 (1993). The Fourth Circuit has indicated that disclosure is preferable, but has, like the Second Circuit, adopted the view that disclosure is not required. *United States v. Morrow, supra*. The Eighth Circuit, by issuing an unpublished affirmance in this case, has approved and implicitly endorsed the practice of

non-disclosure. *Abi-Ghanem v. United States*, No. 93-1141MN (8th Cir. Oct. 21, 1993). (App: 1)

This conflict among the circuits presents a serious problem of uniform application of federal law. To provide the district courts, government prosecutors, and defense attorneys with proper guidance as to whether disclosure is required by either Fed. R. Crim. P. 11 or the due process clause, this Court should resolve the conflict in the circuits. The Court should rule that both Rule 11 and the due process clause require disclosure.

2. On appeal to the Eighth Circuit, Dr. Abi-Ghanem presented a question of first impression in that circuit: whether the package condition of a plea agreement must be disclosed to the district court prior to the acceptance of a defendant's guilty plea. In response, the appellate court issued the following ruling:

> We have carefully considered Abi-Ghanem's contentions and find them to be without merit. We thus affirm the district court. *See* 8th Cir. R. 47B.

Abi-Ghanem v. United States, No. 93-1141MN (8th Cir. Oct. 21, 1993). (App: 1) Thereafter, Dr. Abi-Ghanem requested rehearing en banc and reconsideration by the panel; both requests were summarily denied. (App: 13)

The Eighth Circuit's response violated its own rules, which provide that an affirmance without an opinion is permitted only where "an opinion would have no precedential value." 8th Cir. R. 47B. The court neither addressed directly the package plea issue nor provided any citation to a prior ruling of the Eighth Circuit that would have explained what case law governed and that this was not a novel issue in the Eighth Circuit.

This Court should intervene, pursuant to its supervisory powers, to ensure not only the fairness and essential justice of the criminal justice system[4] but also the integrity of the appellate process in the United States. This case presents an important occasion on which to require the Eighth Circuit, and, by extension, all of the federal courts of appeal, to respect the statutory right to an appeal.

There is no question but that the courts of appeal have the authority to develop techniques to manage and respond to their heavy case load. Overburdened though they may be, however, the federal appellate courts are the courts of last resort for all but a few litigants. Congress has provided for a right of appeal for all litigants who are aggrieved by a final judgment of the trial court. 28 U.S.C. § 1291. Because this is a mandatory right of review, and because it is only review that most litigants will ever obtain, "[a]ppellate courts are among the most important institutions of governance in the United States." Daniel John Meador and Jordana Simone Bernstein, *Appellate Courts in the United States* v (West 1994).

Appellate courts must sometimes decide issues of first impression. *See, e.g., United States v. Alvarez-Machain*, ___ U.S. ___, 112 S. Ct. 2188, 2191, 119 L.Ed.2d 766 (1992); *United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1994); *In re Stansbury Poplar Place, Inc.*, 13 F.3d 122, 126 (4th Cir. 1993); *United States Immigration & Naturalization Svc. v. Fed. Labor Relations Auth.*, 12 F.3d 882, 884 (9th Cir. 1993); *United States v. Bonds*, 12 F.3d 540, 547 (6th Cir.

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[4] *See McCarthy v. United States*, 394 U.S. 450, 464, 89 S. Ct. 1166, 1169, 22 L.Ed.2d 418 (1969); *Mesarosh v. United States*, 352 U.S. 1, 14, 77 S. Ct. 1, 8, 1 L.Ed.2d 1 (1956) (Court has supervisory powers "to see that the waters of justice are not polluted"); *McNabb v. United States*, 318 U.S. 332, 340-42, 63 S. Ct. 608, 613-14, 87 L.Ed. 819 (1943).

1993); *Guilles v. Sea-Land Svc., Inc.* 12 F.3d 381, 383 (2d Cir. 1993); *Gottlieb v. Wiles*, 11 F.3d 1004, 1006 (10th Cir. 1993); *Williams v. Poulos*, 11 F.3d 271, 291 (1st Cir. 1993); *United States v. Cicco*, 10 F.3d 980, 983 (3d Cir. 1993); *United States v. Fleming*, 9 F.3d 1253, 1254 (7th Cir. 1993); *Estiverne v. Sak's Fifth Ave.*, 9 F.3d 1171, 1173 (5th Cir. 1993); *Pavlik v. Cargill, Inc.*, 9 F.3d 710, 713 (8th Cir. 1993); *Connors v. Incoal, Inc.*, 995 F.2d 245, 253 (D.C. Cir. 1993). Such cases are particularly important, because they create the legal framework under which the lower courts within a circuit must operate. Reflective of the special import of cases of first impression, appellate courts have established rules that recognize that issues of first impression differ from other kinds of questions. Thus, the rules of every circuit but the Second oblige appellate courts, when ruling on cases of first impression, to publish their opinions, or not to dispose of these cases in a summary fashion, or both. D.C. Cir. R. 14(b)(1), 14(c); 1st Cir. R. 36.2(a); 3d Cir. IOP 5.1.2, 5.5.1; 4th Cir. IOP 36.4(i); 5th Cir. R. 47.5.1; 6th Cir. IOP 22.4; 7th Cir. R. 53(c)(1)(i); 8th Cir. R. 47(B); 9th Cir. R. 36-2; 10th Cir. R. 36.1; 11th Cir. R. 36-1, 36-2 IOP.3.

In requiring that appellate courts abide by their rules and respect the importance of the right of appeal, this Court will not unduly burden the circuit courts. If the issue is new in the circuit, the court should decide it. If the issue is not one of first impression, all that would be required of a court's disposition – whether by opinion, memorandum, or summary affirmance – is a citation to the controlling circuit authority. If this Court declines to require appellate courts to explain their lawmaking to the litigants before them, then the statutory right to an appeal becomes meaningless, and the federal appeals courts effectively engage in discretionary review.[5]

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[5] While many commentators, including the Chief Justice, have raised the question of whether such a system is preferable,

REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari to Resolve a Serious Conflict Among the Circuits as to Whether a Package Condition of a Plea Agreement Must be Disclosed Prior to a District Court's Determination to Accept a Guilty Plea as Voluntary Under the Constitution and Under Fed. R. Crim. Pro. 11

A. Federal Courts May Not, as a Matter of Constitutional Law and the Federal Rules of Criminal Procedure, Accept a Guilty Plea Without Independent and Thorough Inquiry Into Whether the Plea is Voluntary

Plea bargaining currently resolves the vast majority of federal criminal cases. In 1992, more than eighty-five percent of all federal criminal defendants pleaded guilty. *Annual Report of the Director of the Administrative Office of the United States Courts* 266 (Table D-4) (1992) (hereafter *Annual Report*). Ever since this Court's decision in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 764 (1970), rejecting a constitutional challenge to the practice of plea bargaining, the Court has consistently monitored the practice of plea bargaining to ensure that it comports with due process. *See Brady, supra*; *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971); *Blackledge v. Allison*, 431 U.S. 64, 79 S. Ct. 1621, 52 L.Ed.2d 136 (1977). In addition, Rule 11 of the Federal Rules of Criminal Procedure has been drafted and amended to incorporate the standards that courts must use to evaluate a defendant's plea of guilty. The Court's

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that issue is one for Congress to determine. *See* Address by Chief Justice William Rehnquist at the 75th anniversary of Florida College of Law and the Dedication of Bruton-Greer Hall (Sept. 15, 1984), at 10.

decisions have emphasized the importance of the voluntariness of plea agreements. *See, e.g., Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257-58, 49 L.Ed.2d 108 (1976); *Brady*, 397 U.S. at 749, 90 S. Ct. at 1469. Both the case law and the governing federal rule rely on the district courts to inquire into, and record, a defendant's understanding of the meaning of his or her guilty plea. *McCarthy v. United States*, 394 U.S. at 464-67, 89 S. Ct. at 1170-71; Fed. R. Crim. P. 11(c), (d). Using that record, reviewing courts can meaningfully assess the propriety of the plea and the knowledge and state of mind of a defendant. *See McCarthy*, 394 U.S. at 467, 89 S. Ct. at 1171.

The Court has held that "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. at 748, 90 S. Ct. at 1468. A plea of guilty that is not voluntary fails to comport with due process. *See Blackledge v. Allison, supra.* For a guilty plea to be voluntary under the Constitution, it must represent a freely-chosen and informed decision, made from among the alternatives available to the defendant. *See North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L.Ed.2d 162 (1970). If a plea is induced by threats, demands or other coercive tactics, or if it is influenced by other factors that undermine the defendant's ability to choose, freely and intelligently, from among his or her alternatives, the plea is not voluntary. *See Fontaine v. United States*, 411 U.S. 213, 214-15, 93 S. Ct. 1461, 1462, 36 L.Ed.2d 169 (1973); *Machibroda v. United States*, 368 U.S. 487, 82 S. Ct. 510, 513, 7 L.Ed.2d 473 (1962). Additionally, a plea is coerced and involuntary if it is based on false promises or an incorrect understanding of the available courses of action. *See Blackledge v. Allison*, 431 U.S. at 75, 97 S. Ct. at 1630. If a plea is induced by promises, the government must inform the court of "the essence of those promises." *Santobello v. New York*, 404 U.S. at 261-62, 92 S. Ct. at 498.

B. The Federal Appellate Courts Have Not Developed a Uniform Standard on Disclosure of Package Pleas, and the Conflict Among the Circuits Undermines the Fair Administration of Justice and the Equal Treatment of Defendants

This Court has explicitly recognized that a plea offer that confers a benefit or imposes a liability on a third party "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." *Bordenkircher v. Hayes*, 434 U.S. 347, 364 n.8, 98 S. Ct. 663, 668 n.8, 54 L.Ed.2d 604 (1978) (citing *Brady v. United States*, 397 U.S. at 758, 90 S. Ct. at 1474) (dictum). Aside from this brief statement, however, the Court has offered no guidance to the lower courts as to how they should treat package pleas.

Although the lower courts that have considered the issue have uniformly held that a plea agreement conditioned on a benefit to a third party is not per se impermissible, *see United States v. Marquez*, 909 F.2d 738, 741-42 (2d Cir. 1990) (collecting cases from the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits), *cert. denied*, 498 U.S. 1084, 111 S. Ct. 957, 112 L.Ed.2d 1045 (1991), they have expressed concern about the potential coercive effect of such agreements. *See United States v. Lopez*, 944 F.2d 33, 36 (1st Cir. 1991) (citing *United States v. Buckley*, 847 F.2d 991, 1000 n.1 (1st Cir. 1988), *cert. denied*, 488 U.S. 1015, 109 S. Ct. 808, 102 L.Ed.2d 798 (1989)); *United States v. Marquez, supra* (district court must consider the third-party benefit in determining whether the plea is voluntary); *Politte v. United States*, 852 F.2d 924, 930 & n.13 (7th Cir. 1988) (collecting cases from the First, Sixth, Ninth, Tenth, and Eleventh Circuits); *Bontkowski v. United States*, 850 F.2d 306, 316 (7th Cir. 1988) (Cudahy, J., concurring and dissenting)

(citing *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979)).

Reflective of the increased number of multi-defendant cases, prosecutors have developed the new technique of offering "package pleas" or "wired pleas." Under this practice, prosecutors extend a plea offer to all defendants in a multi-defendant case, but stipulate that the offer is conditioned upon acceptance by all defendants. *See, e.g., United States v. Caro*, 997 F.2d at 659-60; *United States v. Clements*, 992 F.2d at 419; *United States v. Pollard*, 959 F.2d 1011, 1016 (D.C. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 322, 121 L.Ed.2d 242 (1992); *United States v. Gonzalez*, 918 F.2d 1129, 1131 (3d Cir. 1990), *cert. denied sub nom. Caba v. United States*, 498 U.S. 1107, 111 S. Ct. 1015, 112 L.Ed.2d 1097 (1990), and *cert. denied sub nom. Vasquez v. United States*, 499 U.S. 968, 111 S. Ct. 1604, 113 L.Ed.2d 667 (1990), and *cert. denied*, 499 U.S. 982, 111 S. Ct. 1637, 113 L.Ed.2d 733 (1990); *United States v. Morrow*, 914 F.2d at 610; *United States v. Daniels*, 821 F.2d at 78-79; *United States v. Wheat*, 813 F.2d 1399, 1405 (9th Cir. 1987), *aff'd*, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988).

A package plea agreement is one type of plea that involves benefits to third parties. Although federal circuits have found this type of third-party plea agreement permissible, *see, e.g., United States v. Clements*, 992 F.2d at 419; *United States v. Morrow*, 914 F.2d at 613-14; *United States v. Daniels, supra*; *United States v. Castello*, 724 F.2d 813, 814-15 (9th Cir. 1984), *cert. denied*, 467 U.S. 1254, 104 S. Ct. 3540, 82 L.Ed.2d 844 (1984), they are seriously divided on the question whether package pleas must be disclosed to the court during the plea hearing so that the court can adequately determine whether a plea is knowing, intelligent, and voluntary.

The First Circuit was the first court to explicitly address the issue. In an opinion by Judge (now Chief Judge) Breyer, the First Circuit concluded that the package condition of a plea agreement was so material to the plea bargain that failure to disclose it prevented the district court from adequately assessing the voluntariness of the plea. *United States v. Daniels*, 821 F.2d at 78-79.

During the last two years, four other circuits have ruled on this issue. The Ninth Circuit has joined the First Circuit in concluding that the package nature of a plea agreement is material to the determination of whether a plea is voluntary. In *United States v. Caro*, 997 F.2d at 659-60, in an opinion by Judge Kozinski, the Ninth Circuit held that the disclosure of the plea agreement to the district court is "[c]entral to the operation of the Rule 11 hearing," and that the prosecutor therefore "*must* alert the district court to the fact that codefendants are entering a package deal," *id.* at 660 (emphasis added).[6]

The Second Circuit has adopted a different position, stating that while it is "the preferred practice" for the government explicitly to inform the district court of any condition imposed by the plea agreement and accepted by defendants, disclosure of the existence of the package

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[6] Although the District of Columbia Circuit has not yet addressed the issue, it has held that "[t]he appropriate dividing line between acceptable and unconstitutional plea wiring . . . depends upon the conduct of the government." *United States v. Pollard*, 959 F.2d at 1021. This holding concerns the source of the coercion applied to the defendant, not the court's knowledge of the promises extended to the defendant in exchange for a guilty plea. However, the principle relied upon may indicate that the District of Columbia Circuit would join the First and Ninth Circuits in requiring disclosure of a package condition of a plea agreement.

condition of the plea is not required. *United States v. Clements*, 992 F.2d at 419.

The Fourth Circuit has taken yet another view. In *United States v. Morrow*, *supra*, that court concluded that, while the government's failure to disclose the package nature of a plea agreement called for "raise[d] eyebrows," *id.* at 613, disclosure was neither required nor strongly recommended. Instead, upon considering the circumstances surrounding the plea, the court should determine whether the defendant's plea was voluntary. *Id.* at 613-14.

The Eighth Circuit apparently agrees with the Fourth. As discussed above, the Eighth Circuit summarily affirmed the district court's summary denial of Dr. Abi-Ghanem's § 2255 motion. With that motion, Dr. Abi-Ghanem had sought to vacate his plea and conviction on the ground, *inter alia*, that the package nature of the plea agreement was not disclosed to the court. *See supra* page 9.[7] By summarily affirming the district court's action, the Eighth Circuit implicitly ruled that a package plea need not be disclosed.[8]

Uniformity on this issue is essential. The court's inquiry into the voluntariness of a plea is at the core of the mandate to the trial court under Rule 11. Without considering "*all* of the relevant circumstances" surrounding a plea, a court cannot determine whether a defendant's action is truly voluntary. *Brady v. United States*, 397 U.S. at 749, 90 S. Ct. at 1469 (emphasis added, citations

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[7] The district court erroneously treated that claim as an allegation of prosecutorial misconduct, and denied the motion. (App: 6)

[8] The Eighth Circuit had previously held that plea agreements that extend benefits to third parties are not in themselves impermissible. *United States v. Lambros*, 614 F.2d 179 (8th Cir. 1980) (promise not to charge defendant's wife). In that case the third-party benefit was fully disclosed, on the record, at the time the plea was entered. *Id.* at 180.

omitted). *See also United States v. Lopez*, 944 F.2d at 36 (district court rejected guilty plea that included promise to dismiss all charges against codefendant girlfriend out of concern over "undue pressure" to plead guilty defendant may have felt).

C. Package Pleas Must Be Disclosed to Ensure that Courts Have the Knowledge to Assess the Voluntariness of Pleas of Guilty

Courts that have considered plea agreements that include benefits to third parties have held that the district court's determination of voluntariness must be particularly searching, because the plea might have been induced by a third party's threats or promises. *See United States v. Lopez*, 944 F.2d at 36 (citing *United States v. Buckley*, 847 F.2d at 1000 n.1); *United States v. Marquez*, *supra*; *Politte v. United States*, 852 F.2d at 930 & n.13 (collecting cases from the First, Sixth, Ninth, Tenth, and Eleventh Circuits); *Bontkowski v. United States*, 850 F.2d at 316 (Cudahy, J., concurring and dissenting) (citing *United States v. Nuckols*, 606 F.2d at 569). While every aspect of a plea agreement that includes benefits to third parties may not have to be disclosed, either as a matter of due process or under Rule 11, disclosure of the package condition of a plea agreement should be required for a plea to be accepted, both as a matter of constitutional law and of full compliance with Rule 11.

The nature of package pleas makes essential at least the same level of scrutiny that courts have found necessary in the case of other plea agreements that extend benefits to third parties. In some types of plea offers that confer benefits on third parties, the defendant is the only party negotiating with the government. For example, a third party to whom a benefit may accrue may be a bystander to the process. *See, e.g., Bontkowski*, 850 F.2d at

313 (promise not to prosecute wife in unrelated case); *Buckley*, 847 F.2d at 995 (promise not to indict brother).

Package plea agreements, by contrast, as Judge Kozinski found, "pose an additional risk of coercion not present when the defendant is dealing with the government alone." *United States v. Caro*, 997 F.2d at 659 (citations omitted). Unlike other instances in which third parties may derive some benefits from a plea agreement, in a package plea, all of the defendants are privy to the government's offer, and all must come to a unanimous agreement. These package plea conditions pose a special risk that a defendant will enter a false plea, or a plea that is not truly voluntary. The defendant who believes that he or she has most to gain from the agreement may attempt to pressure codefendants to accede to the government's proposal. The defendant with least to gain from the agreement may be intimidated into acceding to the plea. Defendants who, like Dr. Abi-Ghanem, wish to go to trial may accept the plea agreement out of a feeling of obligation or a bond of loyalty to the codefendant who wishes to plead guilty. Without a careful examination of all of the conditions imposed upon each defendant or upon the defendants as a group, the court cannot know the effect of the package plea condition on the decision of each individual defendant to plead guilty.

Because the constitutional mandate of voluntariness reflects an individual's autonomous right to go to trial, trial courts cannot, without knowing of the existence of a package plea, undertake an inquiry adequate to ensure that a plea of any given defendant is in fact voluntary. Thus, as Judge Kozinski explained in *United States v. Caro*, disclosure of the package plea agreement is "[c]entral to the operation of the Rule 11 hearing." *Caro*, 997 F.2d at 659.

D. This Case is an Appropriate One in Which to Resolve the Conflict Among the Circuits

There is no dispute that the government's plea offers to Dr. Abi-Ghanem and Dr. Nguyen included a package condition: if Dr. Abi-Ghanem did not accept the plea offer, Dr. Nguyen would have been foreclosed from doing so. (Gov't Motion in Opposition to Abi-Ghanem Motion to Vacate, at 5) It is also undisputed that this package condition was never made known to the district court before it determined whether Dr. Abi-Ghanem understood all of the conditions of the agreement and whether his plea was voluntary. (App: 40) The record thus establishes that this is a case in which a package plea condition existed, but was not disclosed to the district court.

The issue of whether a package condition of a plea agreement must be disclosed can arise either pre- or post-sentencing. *See, e.g., United States v. Caro, supra* (motion under Fed. R. Crim. P. 32(d)); *United States v. Morrow, supra* (motion under 28 U.S.C. § 2255). In this case, Dr. Abi-Ghanem raised his claim in a collateral challenge pursuant to 28 U.S.C. § 2255. In his motion, he explicitly contended that the undisclosed package condition of his plea bargain rendered his plea involuntary. He supported this claim with affidavits from himself and Dr. Nguyen detailing the reasons why the package condition rendered his plea involuntary. (App: 87-107; 8th Cir. Pet. App. 193-205) Indeed, Dr. Abi-Ghanem's affidavit revealed that he did not correctly understand the package condition of the plea agreement, as he continued to believe that if Dr. Nguyen accepted the package plea, he was obligated to do so as well. (App: 101-07) The government submitted no contrary factual allegations, either from Dr. Abi-Ghanem's original counsel or by citation to the record or the written plea agreement.

The authority for requiring disclosure of a package condition of a plea agreement has two sources. One is Fed. R. Crim. P. 11(e)(2), which provides that "the court shall, on the record, require the disclosure" of any plea agreement. Fed. R. Crim. P. 11(e)(2). The other is the due process clause, which requires that a guilty plea be knowing, intelligent, and voluntary. *See Henderson v. Morgan*, 426 U.S. at 644-45, 96 S. Ct. at 2257. Where the non-disclosure of a package condition of a plea agreement is raised after the plea is entered and prior to sentencing, a defendant would be entitled to relief (i.e. the plea vacated) if disclosure of the condition is required by Rule 11(e)(2). *See United States v. Timmreck*, 441 U.S. 780, 99 S. Ct. 2085, 60 L.Ed.2d 634 (1979). In contrast, where the non-disclosure of a package condition is raised for the first time in a collateral challenge, a defendant would be entitled to relief only if due process also required disclosure of the package condition. *Id.* It is also conceivable that, even if due process does not require disclosure of a package condition in all cases, a particular defendant might be entitled to relief if, under the circumstances of his or her case, failure to disclose the condition rendered the plea involuntary.

Because Dr. Abi-Ghanem raised his claim about non-disclosure in a collateral challenge under § 2255, this case presents the Court with the opportunity to comprehensively examine and answer this range of questions. The Court could rule that: (1) neither Fed. R. Crim. P. 11(e)(2) nor due process requires disclosure; (2) Fed. R. Crim. P. 11(e)(2) requires disclosure, but disclosure is not required as a matter of due process; (3) due process requires disclosure of a package condition in all cases; or (4) due process does not require disclosure in all cases, but a defendant might still be able to show in a collateral challenge that the failure to disclose the condition under

particular circumstances rendered the guilty plea involuntary.

This case, then, provides a particularly useful context in which to resolve the conflict among the circuits concerning disclosure of a package condition of a plea agreement. Not only are the facts concerning the non-disclosure undisputed, but the Court's decision will provide the lower federal courts with guidance both as to how to address disclosure at the Rule 11 hearing, and as to how to address non-disclosure claims raised prior to sentencing and those raised in a collateral challenge.

II.

This Court Should Grant the Petition for Certiorari to Exercise Its Supervisory Powers to Ensure that the Intermediate Appellate Courts Do Not Avoid Their Obligation to Provide Appellate Review as Required by Law

A. Appellate Courts are Central Institutions for Court-Based Law Making, and have Recognized the Centrality to Their Function of their Role of Establishing Precedents

The circuit courts are the courts of last resort for the vast majority of litigants. In 1992, more than 47,000 cases were filed in the circuit courts. *Annual Report, supra,* at 130 (Table B). Because this Court cannot possibly grant all of the petitions filed before it, courts of appeal attempt to fill the breach; indeed, circuit courts make efforts to avoid intercircuit conflict, and thus lessen the burden on this Court. *See* S. Ct. R. 10.1(a); *see also Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (obligation of the circuit courts to avoid intercircuit conflict if possible). Appellate courts thus fulfill several important functions, including ensuring that law is interpreted uniformly, that it is applied correctly, and that law evolves through the

"explanations of their decisions." Meador and Bernstein, *supra*, at 4.

Circuit courts make law by establishing precedent. Precedent guides the lower courts, as well as enforcement agencies and future litigants. While the importance of establishing precedent is recognized by circuit rules and by case law, not every decision rendered by a circuit court involves the setting of precedent. In light of the fact that some appellate court opinions do not set or expand upon precedent, every circuit but the Second has concluded that some of its decisions need not be published. *See* D.C. Cir. R. 14(c); 1st Cir. R. 36.2(a); 3d Cir. R. IOP 5.1.2; 4th Cir. IOP 36.4; 5th Cir. R. 47.5.1; 6th Cir. IOP 22.4; 7th Cir. R. 53(c); 8th Cir. R. 47A, 47B; 9th Cir. R. 36-2; 10th Cir. R. 36.1; 11th Cir. R. 36-1.

But the appellate courts have not left the question of publication without regulation, nor is that issue free from debate. *See* Lauren K. Robel, *The Myth of the Disposable Opinion*, 87 Mich. L.Rev. 940 (1989). Rules of the circuits establish when opinions are to be published, and distinguish between dispositions of value only to the parties directly affected by the appeal, and those of value to litigants in general. Under the rules of each circuit, the courts either reserve for publication opinions that *do* establish precedent, or stipulate that opinions that *do not* establish new precedent will not be published. *See supra* page 14.

These federal appellate rules demonstrate the commitment of the federal appellate courts to establishing and maintaining a cohesive body of precedent. If opinions of precedential value are not published, the court may be required to decide repeatedly the same issue, the court's efforts benefit only the parties directly affected by the disposition, future litigants are deprived of case law

under which they could prevail, and parties may engage in activities that the court has found to be illegal.

Case law has also focused on the importance of appellate court decisions as precedents. This Court recently declined to decide whether, as part of a settlement, parties could insist upon vacatur of a court opinion. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, ___ U.S. ___, 114 S. Ct. 425, 126 L.Ed.2d 396 (1994). In dissent, Justice Stevens, joined by Justice Blackmun, stated that a legal ruling belongs not to the parties but to society at large, because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 431 (Stevens, J., dissenting). In view of "[t]he public interest in preserving the work product of the judicial system," *id.* at 432, the dissenters stated that vacatur should not be granted unless it served the public interest. *Id.* Similarly, several appellate courts have also concluded that court opinions are not the property of the parties, that their value redounds to the public at large as well, and that to wipe out an opinion at the request of the parties is therefore impermissible. *See, e.g., Mfrs. Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993); *Oklahoma Radio Assocs. v. Fed. Deposit Ins. Corp.*, 3 F.3d 1436 (10th Cir. 1993); *Matter of Memorial Hosp.*, 862 F.2d 1299 (7th Cir. 1988) (Easterbrook, J.); *see also Nat'l Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989) (grant of vacatur depends on circumstances of individual case). *But see U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992) (federal circuit permits vacatur on settlement), *cert. dismissed sub nom. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, ___ U.S. ___, 114 S. Ct. 425 (1994).

B. Under the Current Federal Appellate Structure, Each Circuit Has the Obligation to Establish Its Own Precedents

The corollary of the proposition that circuit courts have an obligation to establish precedent is that each circuit must decide each new legal proposition for itself. Although each circuit may consider out-of-circuit decisions persuasive and may find their reasoning compelling, circuits cannot use such decisions as their own precedents without formally adopting them. *See* James Moore et al., 1B *Moore's Federal Practice* ¶ 0.402[1] (5th ed. 1993). Each circuit court must analyze each new issue before it on its own merits, and a court of appeals may not abrogate its law-making function. As the Seventh Circuit has stated, "[W]e recognize that, within reason, the parties to cases before us are entitled to our independent judgment." *Colby v. J.C. Penney Co., Inc.*, 811 F.2d at 1123 (Posner, J.).

Because each circuit has an obligation to decide each new issue for itself, it follows that each circuit is also obliged to respond when a litigant contends that an issue is one of first impression. The importance of making law imposes a duty to cite to law that has been made. Thus, if the litigant errs in claiming that the circuit has not yet decided an issue, it is the circuit's duty to correct the litigant's error. Failure to do so reinforces the litigant's erroneous view, undermining his or her confidence in the judicial system, and also makes it difficult for the litigant to examine the controlling precedent, evaluate it against his or her case, and submit a petition for rehearing if that is warranted. No circuit court should fail to set forth its reasoning and conclusion when faced with an issue of first impression.

C. Failure to Explain Cases of First Impression Erodes Litigants' Rights of Appeal; While Workload Pressures Permit Innovations, Those Innovations Cannot Deny the Right of Appeal

It is undisputed that the courts of appeal are faced with increasingly heavy dockets. *Annual Report, supra,* at 130 (Table B). No one should minimize the stress of such caseload pressures, and this petition does not quarrel with the decision of the courts of appeal to manage their case load by publishing opinions in some cases, issuing unpublished memorandum decisions in other cases, *see, e.g.,* 3d Cir. IOP 5.1.2; 9th Cir. R. 36-1; 11th Cir. R. 36-2, issuing summary affirmances in other cases, *see, e.g.,* D.C. Cir. R. 14(c); 4th Cir. IOP 36.3; 5th Cir. R. 47.6, or announcing their decisions from the bench, *see, e.g.,* 6th Cir. IOP 22.7, 7th Cir. R. 53(c)(2).

Those workload pressures, however, cannot be the basis of destroying litigants' statutory rights of appeal. While review by this Court is discretionary, every litigant in the federal courts has a statutory right to an appeal to the intermediate appellate courts. *Abney v. United States,* 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, 52 L.Ed.2d 651 (1977); 28 U.S.C. § 1291. While a right to an appeal does not entitle litigants to any particular form of decision, the right to appeal does require that appellate courts explain to litigants either that their cases require no explanation or what rule of law governs the issue at hand. When a litigant argues that the circuit has no governing law, an appellate court must respond by, at a minimum, citing the law of the circuit that mandates a particular result. To do otherwise undermines public respect for and public confidence in the judicial system.

This case provides an appropriate opportunity for this Court to reaffirm the statutory right of appeal, by requiring the Eighth Circuit either to address this question, novel to it, or to cite to the prior decision that

governs the requirement of disclosing package pleas.[9] Here, the Eighth Circuit stated that it had carefully considered the issues raised in Dr. Abi-Ghanem's appeal and that it found his contentions to be without merit. Had it followed that statement with a citation to a statute or a case, so that Dr. Abi-Ghanem would be apprised of the legal principle on which his case was decided, its obligation would have been fulfilled. But the Eighth Circuit provided no citation, and in fact, has no law governing this issue. Its bare rejection, without any indication of what law mandates or permits its conclusion, is the equivalent of a refusal to review the case at all.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the questions raised in this petition.

Respectfully submitted,

Of Counsel:

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*Counsel of Record

Date: March 7, 1994

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[9] Because this issue concerns the propriety of summary affirmance in cases of first impression, it can never arise out of a published opinion.

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EXHIBIT A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1141MN

Georges Victor Abi-Ghanem, Appellant, v. United States of America, Appellee.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota. [UNPUBLISHED]

Submitted: October 12, 1993

Filed: October 21, 1993

Before FAGG, Circuit Judge, ROSS, Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Georges Victor Abi-Ghanem appeals the district court's refusal to vacate his plea of guilty to charges of mail fraud and conspiracy to defraud the government. Abi-Ghanem contends his plea was coerced, involuntary,

and not supported by a factual basis. We have carefully considered Abi-Ghanem's contentions and find them to be without merit. We thus affirm the district court. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Georges V. Abi-Ghanem,
Petitioner,

v.

United States of America,
Respondent.

CIVIL
4-92-593

MEMORANDUM
AND
ORDER

United States of America,
– Plaintiff,

v.

Georges V. Abi-Ghanem,
Defendant.

CRIM.
4-90-118 (02)

Georges V. Abi-Ghanem, P.O. Box 100-609, Duluth, MN 55814, pro se.

Thomas B. Heffelfinger, United States Attorney, and Jeanne J. Graham, Assistant U.S. Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for respondent.

This matter is before the Court on petitioner's motion under 28 U.S.C. § 2255 to vacate his guilty plea and

dismiss the indictment and judgment, or, in the alternative, to vacate, set aside, or correct his sentence.[1]

I. Request for Vacation of Guilty Plea

Petitioner seeks to have his guilty plea vacated on the following grounds: the plea was not voluntary; he pled guilty as a result of prosecutorial misconduct; the government suppressed evidence; he is innocent; the court did not make a sufficient independent inquiry into the facts; and the court did not inform him that he did not have an absolute right to withdraw the plea.

A. Voluntariness of Plea

Petitioner contends that his guilty plea was not voluntary for two reasons. First, petitioner claims his plea was involuntary due to ineffective assistance of counsel. In order to prevail on his ineffective assistance of counsel claim, petitioner must show that his attorney's performance fell below an objective standard of reasonableness and that his attorney's conduct was prejudicial to petitioner. *Wilson v. Armontrout*, 962 F.2d 817, 819 (8th Cir. 1992) (citing *Strickland v. Washington*, 446 U.S. 668 (1984)).

---

[1] Petitioner was released from federal custody and supervision on or about June 19, 1992. Petitioner submitted this motion one day earlier, June 18, 1992. Many of the issues raised in this motion were implicitly addressed by the United States Court of Appeals for the Eighth Circuit in an order issued after this motion was filed. The Eighth Circuit's order affirmed the Court's denial of petitioner's motion for a reduction of his sentence under Federal Rule of Criminal Procedure 35. *United States v. Abi-Ghanem*, No. 92-1108MN (8th Cir. June 25, 1992).

Petitioner contends that counsel coerced petitioner into pleading guilty rather than going to trial. The record contradicts this charge. At the change of plea hearing, the Court questioned petitioner at length to determine whether or not his plea was truly voluntary. Plea Transcript at 19-20. Petitioner told the Court that he had not been threatened or forced to plead guilty and that no promises had been made to him, other than those contained in the plea agreement. Moreover, petitioner specifically told the Court that he had ample opportunity to discuss with his attorney the charges against him, the right to a trial, and the consequences of pleading guilty. Plea Tr. at 7. Petitioner also told the Court that he was satisfied with his representation. Plea Tr. at 8. In short, petitioner has not shown to the court that his attorney's performance fell below an objective standard of reasonableness or that his attorney's conduct was prejudicial.

Second, petitioner contends that his guilty plea was involuntary because he was not informed of the elements of the charges against him. Again, the change of plea transcript proves otherwise. Petitioner's attorney went through the elements of the crimes and the factual basis supporting each element. Plea Tr. 20-26.

The Court is satisfied that petitioner's guilty plea was voluntary.

B. Prosecutorial Misconduct

Petitioner argues that his guilty plea should be vacated on the basis of prosecutorial misconduct. Prosecutors must "refrain from improper methods calculated to produce a wrongful conviction," however, the adversary system permits the prosecutor to "prosecute with earnestness and vigor." *Berger v. United States*, 295 U.S. 78, 88 (1935). Before petitioner agreed to plead guilty, the Assistant United States Attorney informed all defendants in the action that the United States would not enter into a plea agreement with any single defendant if any other defendant went to trial. Petitioner alleges that the government concealed this coercion from the Court at the change of plea hearing and the plea should therefore be vacated. In the judgment of the Court a decision by the government not to enter into separate plea agreements does not constitute an improper method calculated to produce a wrongful conviction. A tremendous expenditure of resources would have been necessary if any individual defendant had gone to trial and the government could legitimately conclude that if a trial was necessary it would be in the public interest to attempt to prove all charges against all defendants. Petitioner had a choice of whether to plead guilty or go to trial and he chose to plead guilty. Petitioner's predicament was the result of his own criminal misconduct, not prosecutorial misconduct.

C. Suppression of Evidence

Petitioner argues that his guilty plea should be vacated because the government suppressed evidence that was favorable to him and he would not have plead guilty but for the alleged suppression of evidence. However, the United States Court of Appeals for the Eighth Circuit has made clear that in pleading guilty, a defendant waives his claim of failure to disclose favorable evidence. *Smith v. United States*, 876 F.2d 655, 657 (8th Cir. 1989). Thus, the Court will not vacate petitioner's guilty plea on this ground.

D. Claim of Innocence

Petitioner contends that his guilty plea should be vacated because he is innocent. Petitioner asserts that he did not have the necessary criminal intent to commit the crimes charged. However, the petitioner's testimony at the change of plea hearing contradicts this assertion. Petitioner admitted he engaged in criminal conduct and he admitted that he did so knowingly and intentionally. Plea Tr. 20-26. Moreover, petitioner raised this argument previously before the Court in a Rule 35 motion. The Court denied that motion and the Eighth Circuit affirmed that ruling. *United States v. Abi-Ghanem*, No. 92-1108MN (8th Cir. June 25, 1992). Thus, the Court will not vacate the guilty plea on the ground that petitioner did not have the necessary criminal intent.

E. The Court's Inquiry into the Factual Basis for the Plea

Petitioner argues that his guilty plea should be vacated because the Court did not make in independent inquiry into the factual basis for the plea. Again, the change of plea transcript proves otherwise. The Court listened carefully as petitioner's attorney went through the elements of the offenses and the facts that made him guilty of the crimes. Plea Tr. at 20-26. In fact, after petitioner completed his admission of the facts underlying the offenses, the Court specifically asked petitioner whether he had committed the illegal acts knowingly and intentionally, to which petitioner responded that he had. Thus, the Court was, and remains, satisfied that there was a sufficient factual basis for the plea.

F. Failure to Inform Petitioner that He Did Not Have Absolute Right to Withdraw Guilty Plea

Petitioner contends that his guilty plea should be vacated because the Court did not inform him that he did not have a absolute right to withdraw the plea before sentencing. The law is that if the government agrees to make a recommendation for a *particular* sentence, with the understanding that such a recommendation shall not be binding on the Court, the Court must advise a defendant that if it does not accept the recommendation the defendant nevertheless has no right to withdraw his guilty plea. Fed.R.Crim.P. 11(e) (emphasis added). Petitioner contends that he pled guilty with the intention to withdraw his plea and get ready for trial as soon as the government returned allegedly suppressed evidence to

him. Petitioner asserts that the plea agreement procedure as a process brought his plea agreement within the coverage of the rule and required an admonition that petitioner would have no right to withdraw the plea. After careful review, the Court is convinced that it had no duty to inform petitioner that he would be unable to withdraw his guilty plea.

The plea agreement clearly shows that the government made no recommendation for a particular sentence. The parties agreed, pursuant to the plea agreement, to the following: certain maximum penalties applied; the government would dismiss the remaining counts at the time of sentencing; the Sentencing Guidelines did not apply; restitution would not be a part of the sentence; the government could seek costs for prosecution; and that there was no agreement as to the imposition of a fine. Except for the provision addressing restitution, no aspect of the agreement can be construed as a recommendation for a particular sentence. Moreover, the Court enforced the parties' agreement as to restitution at the time of sentencing. Thus, the Court finds that the requirements of Rule 11 were satisfied. *See United States v. Missouri Valley Const. Co.*, 704 F.2d 1026, 1029 (8th Cir. 1983) ("The established rule in this circuit is that district courts are required to act in substantial compliance with the dictates of rule 11, although 'ritualistic' compliance is not required.").

II. Request for Dismissal of the Indictment

Petitioner requests that the Court dismiss the indictment for two reasons. First, petitioner asserts that the

indictment should be dismissed on the basis of outrageous government conduct. The Court may dismiss a criminal indictment when government conduct is so outrageous that it violates due process. *United States v. Wiley*, 794 F.2d 514, 515 (9th Cir. 1986). However, the conduct must be so outrageous that it shocks the conscience of the Court. *Id.* Petitioner alleges that the search of petitioner's former employer, EWA Incorporated, was not for the purpose stated in the warrant, but rather was conducted to retrieve information which could have embarrassed the government. Petitioner also contends that the government selectively prosecuted him and the government used racial politics to coerce his plea. The Court is satisfied that the government investigated and indicted this case because it discovered a fraudulent scheme to extract large amounts of money from the government for falsely billed hours. The Court finds no evidence of a cover-up, selective prosecution, or racial coercion, and, accordingly, rejects petitioner's claims of outrageous government conduct.

Second, petitioner asserts that the indictment should be dismissed due to an illegal search and seizure. However, because petitioner plead guilty, he is specifically precluded from challenging the validity of the search and seizure in this motion. *Smith v. United States*, 876 F.2d 655, 657 (8th Cir. 1989). Moreover, petitioner has already challenged the validity of the search and seizure in his Rule 35 motion, the denial of which has been affirmed by the Eighth Circuit. *United States v. Abi Ghanem*, No. 92-1108MN (8th Cir. June 25, 1992).

III. Request for Dismissal of Judgment

Petitioner argues that the judgment should be dismissed because the Court ignored the intent of Congress when it provided a grant to the Yakima Indian Nation. Petitioner raised this argument in his appeal from the Court's earlier denial of his Rule 35 motion for a sentence reduction. The Eighth Circuit rejected the argument in connection with that motion, *United States v. Abi-Ghanem*, No. 92-1108MN (8th Cir. June 25, 1992), and the Court will not reexamine this issue.

IV. Request for Vacation of Sentence

Petitioner argues that his sentence should be vacated for two reasons. First, petitioner contends that the Court wrongfully denied his Rule 35 motion. Whether to grant a Rule 35 motion is within the informed discretion of the Court. *United States v. Eddy*, 677 F.2d 656, 657 (8th Cir. 1982). The Court carefully considered petitioner's Rule 35 motion at the time it was made and concluded that a modification in petitioner's sentence was not warranted. The Eighth Circuit affirmed that conclusion, *United States v. Abi-Ghanem*, No. 92-1108MN (8th Cir. June 25, 1992), and the Court will not revisit the issue.

Second, petitioner asserts that his sentence should be vacated because it was based on erroneous information contained in the Pre-Sentence Investigation Report (PSI). More specifically, petitioner contends that the PSI incorrectly calculated the amount of loss. Petitioner asserts that there were a number of hours for which defendants did not bill the government, and those hours exceeded

the number of hours fraudulently billed. The Court carefully considered this assertion at the time of sentencing. Sentencing Transcript at 6. Moreover, petitioner and his codefendants submitted voluminous materials to the Court before sentencing. At the time of sentencing, the Court carefully listened to both sides, considered the differing methods of calculating the amount of loss, and decided to follow the recommendations of the PSI, which were based on an extensive audit report and numerous interviews. Moreover, petitioner raised this issue in his Rule 35 motion and the Eighth Circuit held that petitioner's sentence, which was based in part on the amount of loss, was within the appropriate discretion of the Court. *United States v. Abi-Ghanem*, No. 92-1108 MN (8th Cir. June 25, 1992).

The Court will deny petitioner's motion to vacate his sentence.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that petitioner's motion to vacate his guilty plea and dismiss the indictment and judgment or, in the alternative, to vacate, set aside, or correct his sentence, is denied.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: October 30, 1992

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1141MNMI

Georges Victor Abi-Ghanem,
Plaintiff - Appellant,

vs.

United States of America,
Defendant - Appellee.

* Order Denying
* Petition for
* Rehearing and
* Suggestion for
* Rehearing En
* Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 6, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
	)	INDICTMENT
Plaintiff,	)	(15 U.S.C. § 645(a))
	)	(18 U.S.C. § 2)
v.	)	(18 U.S.C. § 371)
	)	(18 U.S.C. § 1001)
VIETCHAU VAN NGUYEN, GEORGES VICTOR ABI-GHANEM, and EWA, INCORPORATED,	)	(18 U.S.C. § 1341)
	)	(18 U.S.C. § 1343)
	)	(18 U.S.C. § 2314)
	)	(Filed Sept. 21, 1990)
Defendants.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT ONE

INTRODUCTION

At all times pertinent to this indictment:

1. Defendant EWQ, Inc., (EWA), was a Minnesota Corporation with contracts to conduct environmental studies for various Agencies and Departments of the United States.

2. Defendant Vietchau Van Nguyen was the majority owner and President of EWA.

3. Defendant Georges Victor Abi-Ghanem was the Vice-President of EWA.

4. The United States Department of Energy (DOE) awarded a grant to the Yakima Indian Nation (YIN) Toppenish, Washington, authorizing YIN to pay qualified engineers and scientists to review technical data gathered by DOE concerning physical characteristics of YIN land near a potential nuclear waste repository, the Hanford Nuclear site.

5. The Department of the Army, through its St. Paul District of the United States Army Corps of Engineers (COE), administered contracts with professional engineers for hydraulic and hydrology related studies.

6. The Small Business Administration (SBA), an Agency of the United States, administered programs which provided assistance to minority and disadvantaged business concerns, referred to as the "8(a)" program.

MAIL AND WIRE FRAUD

7. From on or about November 5, 1984, and continuing until about December 31, 1988, in the State and District of Minnesota, and elsewhere,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

each aiding and abetting each other and aided by other co-schemers known and unknown to the Grand Jury, did devise a scheme and artifice to defraud the United States, its departments and agencies, to obtain contracts from the DOE, COE and SBA, for money and property by means of

false, fictitious and fraudulent pretenses, representations and promises, well knowing the pretenses, representations and promises were false and fraudulent when made.

MANNER AND MEANS

8. It was part of the scheme and artifice to defraud that in May 1984, EWA, Nguyen and Abi-Ghanem obtained a contract from YIN for monies from a DOE grant to do environmental engineering consultation on the effect of the Hanford Nuclear Site on YIN land.

9. It was further part of the scheme and artifice to defraud that in 1986 defendants obtained a government contract from COE for hydrology studies and in 1988 obtained a similar contract from COE through SBA under the "8(a)" program.

10. It was further part of the scheme and artifice to defraud that defendants Nguyen and Abi-Ghanem, falsely represented to the COE and SBA that they were licensed professional engineers, "P.E.'s", when they were not so licensed, causing the COE and SBA to give EWA government contracts in 1986 and 1988 which required professional engineers.

11. It was further part of the scheme and artifice to defraud that, in order to obtain the contracts and to obtain higher contract amounts, defendants falsely represented to COE and SBA the qualifications of EWA employees and the pay rate for EWA employees.

12. It was further part of the scheme and artifice to defraud that in 1986-1987, defendants hired less qualified

employees to work on the COE contract than represented to COE and paid those employees at a rate substantially less than that represented to COE.

13. It was further part of the scheme and artifice to defraud that defendants in 1986-1987 caused to be submitted to COE invoices for costs and services on the COE hydrology contract and caused COE to mail payments to EWA which were based on a higher contract amount than that to which defendants were entitled.

14. It was further part of the scheme and artifice to defraud that Nguyen and Abi-Ghanem would instruct and coerce their employees into overstating their work hours on the YIN contract and to record work hours spent on non-YIN work as though those work hours were spent on the YIN contract.

15. It was further part of the scheme and artifice to defraud that Hguyen and Abi-Ghanem would overstate their own hours spent on the YIN contract.

16. It was further part of the scheme and artifice to defraud that EWA, Nguyen and Abi-Ghanem misrepresented work hours and rates of pay for their employees in the contract which substantially inflated the billings submitted to the YIN.

17. It was further part of the scheme and artifice to defraud that EWA, Nguyen and Abi-Ghanem, upon being informed of the termination of the majority of the YIN contract, directed their employees to develop a slide presentation which promoted EWA and charged the work hours spent on that slide presentation to the YIN contract.

18. It was further part of the scheme and artifice to defraud that EWA, Nguyen and Abi-Ghanem submitted and caused to be submitted vouchers to YIN for services supposedly rendered on the YIN contract, causing YIN to pay EWA with money from the DOE grant to which EWA was not entitled, including, but not limited to, the following vouchers:

DATE	VOUCHER NUMBERS	VOUCHER TOTAL CLAIM
November 8, 1985	001	$ 49,784.68
April 8, 1986	006	70,337.04
March 6, 1987	005	111,157.33
November 11, 1987	001	240,908.20
January 9, 1988	003	251,459.56
February 9, 1988	004	203,107.81
March 9, 1988	005	136,030.84
March 8, 1988 (April 8, 1988)	005	93,292.48
May 23, 1988	006	30,534.16
June 9, 1986	008	20,006.46
November 10, 1988	001	20,924.98
December 7, 1988	002	23,103.07
January 11, 1989	003	12,499.13

MAIL AND WIRE FRAUD

19. On or about January 9, 1988, in the State and District of Minnesota, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

caused to be transmitted in interstate commerce by means of wire through the telecommunications company MCI,

certain electronic signals, namely a billing to the YIN at MCI ID 261-6133, in Toppenish, Washington, for services for the month of December 1987, in the amount of $251,459.56; all in violation of Title 18, United States Code, Sections 2 and 1343.

COUNT TWO

1. The Grand Jury realleges and incorporates by reference paragraphs one through eighteen of Count One of this Indictment, as though fully set forth herein.

2. On or about March 11, 1988, in the State and District of Minnesota, for the purpose of executing the scheme and artifice to defraud and attempting to do so, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

caused to be transmitted in interstate commerce by means of MCI, certain electronic signals, namely a billing to the YIN at MCI ID 261-6133, in Toppenish, Washington, for services for the month of February 1988 in the amount of $136,030.84; all in violation of Title 18, United States Code, Sections 2 and 1343.

COUNTS THREE-SIX

1. The Grand Jury realleges and incorporates by reference paragraphs one through eighteen of Count One of this Indictment, as though fully set forth herein.

2. On or about the dates set forth below, in the District of Minnesota, for the purpose of executing the scheme and artifice to defraud and attempting to do so, the defendants, knowingly caused to be placed in a post office or authorized depository for mail matter and caused to be delivered by the United States Postal Service, according to the directions thereon, letters containing YIN checks, each of which is more fully described below, addressed to EWA, Inc., 133 First Avenue North, Minneapolis, MN 55401:

Count No.	Date	Check Description
THREE	February 9, 1988	Check No. 46934 Amount $109,850.93
FOUR	February 29, 1988	Check No. 48140 Amount $100,000.00
FIVE	March 23, 1988	Check No. 49648 Amount $136,120.80
		Check No. 49649 Amount $103,107.81
SIX	November 30, 1988	Check No. 64343 Amount $20,924.74

All in violation of Title 18, United States Code, Sections 2 and 1341.

COUNTS SEVEN-TEN

1. The Grand Jury realleges and incorporates by reference paragraphs one through eighteen of Count One of this Indictment, as though fully set forth herein.

2. On or about the dates set forth below in the State and District of Minnesota, for the purpose of executing the scheme and artifice to defraud and attempting to do so, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

knowingly caused to be placed in a post office or authorized depository for mail matter and caused to be delivered by the United States Postal Service, according to the directions thereon, letters from the United States Army Corps of Engineers, St. Paul, Minnesota, containing United States Treasury checks, each of which is more fully described below, addressed to EWA, Incorporated, 133 First Avenue North, Minneapolis, MN 55401:

Count No.	Date	Check Description
SEVEN	July 24, 1987	Check No. 343847 Amount $29,200.21
EIGHT	September 24, 1987	Check No. 346420 Amount $26,360.88
NINE	October 27, 1987	Check No. 347750 Amount $2,052.49
TEN	December 22, 1987	Check No. 349953 Amount $14,854.75

All in violation of Title 18, United States Code, Sections 2 and 1341.

TRANSPORTATION OF STOLEN GOODS

COUNT ELEVEN

1. The Grand Jury realleges and incorporates by reference paragraphs one through eighteen of Count One of this Indictment, as though fully set forth herein.

2. On or about April 20, 1988, in the State and District of Minnesota, for the purpose of executing the scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly cause to be transported in interstate commerce, that is by Federal Express, a package from the Yakima Indian Nation, Toppenish, Washington to EWA, INCORPORATED, 133 First Avenue North, Minneapolis, MN 55401, which package contained a check taken by fraud, that is Yakima Indian Nation check number 51242, in the amount of $141,608.51; all in violation of Title 18, United States Code, Section 2314.

COUNT TWELVE

1. The Grand Jury realleges and incorporates by reference paragraphs one through eighteen of Count One of this Indictment, as though fully set forth herein.

2. On or about July 5, 1988, in the State and District of Minnesota, for the purpose of executing the scheme and artifice to defraud and to obtain money by means of

false and fraudulent pretenses and representations, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly cause to be transported in interstate commerce, that is by Federal Express, a package from the Yakima Indian Nation, Toppenish, Washington to EWA, INCORPORATED, 133 First Avenue North, Minneapolis, MN 55401, which package contained checks taken by fraud, that is Yakima Indian Nation check number 55318, in the amount of $20,006.31 and Yakima Indian Nation check number 55319, in the amount of $30,534.03; all in violation of Title 18, United States Code, Section 2314.

FALSE STATEMENTS

COUNT THIRTEEN

On or about January 9, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 003 for services and expenses for the month of December 1987 against DOE Grant No. DEFG0683RL10545 for a total of $251,459.56,

whereas in truth the voucher for payment should have been substantially less, approximately $195,156.32, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT FOURTEEN

On or about February 9, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 004 for services and expenses for the month of January, 1988 against DOE Grant No. DEFG0683RL10545 for a total of $203,107.81,

whereas in truth the voucher for payment should have been substantially less, approximately $30,677.57, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT FIFTEEN

On or about March 9, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 005 for services and expenses for the month of February 1988 against DOE Grant No. DEFG0683RL10545 for a total of $136,030.84,

whereas in truth the voucher for payment should have been substantially less, approximately $20,508.70, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT SIXTEEN

On or about April 8, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 005 for services and expenses for the month of December 1988 against DOE Grant No. DEFG0683RL10545 for a total of $93,292.48,

whereas in truth the voucher for payment should have been substantially less, approximately $9,070.70, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT SEVENTEEN

On or about May 23, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 006 for services and expenses for the month of April 1988 against DOE Grant No. DEFG0683RL10545 for a total of $30,534.16,

whereas in truth the voucher for payment should have been substantially less, approximately $29,001.24, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT EIGHTEEN

On or about June 9, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 008 for services and expenses for the month of May 1988 against DOE Grant No. DEFG0683RL10545 for a total of $20,006.46,

whereas in truth the voucher for payment should have been substantially less, approximately $18,171.18, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT NINETEEN

On or about November 10, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and

representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 001 for services and expenses for the month of October 1988 against DOE Grant No. DEFG0683RL10545 for a total of $20,924.98,

whereas in truth the voucher for payment should have been substantially less, approximately $16,780.73, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT TWENTY

On or about December 7, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 002 for services and expenses for the month of November 1988 against DOE Grant No. DEFG0683RL10545 for a total of $23,103.07,

whereas in truth the voucher for payment should have been substantially less, approximately $19,253.83, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged

and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT TWENTY-ONE

On or about January 11, 1989, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to the YIN a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the DOE; that is,

> voucher no. 003 for services and expenses for the month of December 1988 against DOE Grant No. DEFG0683RL10545 for a total of $12,499.13,

whereas in truth the voucher for payment should have been substantially less, approximately $10,232.05, because, as defendants well knew, the hours employees worked on the grant project were inflated, mischarged and manipulated to appear as though they worked more hours than they did on the project; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT TWENTY-TWO

On or about January 8, 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully make and present a false statement, in documentation submitted to the Small Business Administration for the purpose of obtaining a Government contract by misrepresenting the qualifications of EWA's employees, including representing themselves as Professional Engineers; all in violation of Title 15, United States Code, Section 645(a).

COUNT TWENTY-THREE

1. On about January 2, 1985, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to COE a false, fictitious and fraudulent statement and representation by signing a COE contract representing that EWA employees were more qualified than they actually were, including representing Abi-Ghanem and Nguyen as Professional Engineers when they were not; all in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT TWENTY-FOUR

1. In about April 1988, in the State and District of Minnesota, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did knowingly and willfully cause to be made and presented to COE, a false, fictitious and fraudulent statement and representation by representing that Nguyen and Abi-Ghanem were Professional Engineers in documents SF 254 and SF 255 used for the purpose of obtaining a COE Government contract, when in truth they were not Professional Engineers; in violation of Title 18, United States Code, Sections 2 and 1001.

COUNT TWENTY-FIVE

From on or about October 1, 1984, and continuing until about December 31, 1988, in the State and District of Minnesota, and elsewhere, the defendants,

VIETCHAU VAN NGUYEN,
GEORGES VICTOR ABI-GHANEM, and
EWA, INC.,

did willfully and knowingly combine, conspire and agree together, and with other persons known and unknown to the Grand Jury, to defraud the United States, its agencies and departments, namely the Department of Energy, the Department of the Army, and the Small Business Administration, and to commit offenses against the United States, more particularly:

(A) To violate Title 18, United States Code, Sections 1341 and 1343 by willfully and knowingly using and causing the mails and wires to be used in the execution of

the scheme and artifice to defraud which is set forth more fully in paragraphs 1 through 18 of Count One of this Indictment, which paragraphs are incorporated by reference herein; and

(B) To violate title 18, United States Code, Section 1001 and Title 15, United States Code, Section 645(a) by willfully and knowingly causing to be made and used false writings and documents submitted to the YIN, COE and SBA in connection with obtaining contracts for which they were not qualified and obtaining money from the YIN and COE to which they were not entitled.

OVERT ACTS

In furtherance of the conspiracy and to accomplish its objects, Vietchau Van Nguyen, Georges Victor Abi-Ghanem, and others did commit, in the District of Minnesota, the following overt acts:

1. In or about October 1984, Georges Abi-Ghanem travelled to his home in Lebanon and charged 164 hours of work to the YIN/DOE contract while there for personal reasons.

2. On or about January 10, 1986, Nguyen signed COE contract no. DACW37-86-D-0014 as the president of EWA, Inc.

3. In 1986 and 1987, the defendants caused to be presented false claims to the COE for money under the 1986 COE contract because the invoices submitted as claims were based on false information about EWA's employees and pay scales.

4. In or about March of 1986 Abi-Ghanem instructed employee Kristi Jungroth to charge false hours of work to the YIN/DOE contract.

5. In or about March of 1986, Abi-Ghanem altered the timesheet of John Seaberg and charged Seaberg's work on a private contract, CH2MHill Company contract to the YIN/DOE contract.

6. In or about February 1987, Abi-Ghanem instructed employee Amal Djerrari to charge one-half of his time spent on an unrelated "NSF" project to the YIN/DOE contract.

7. In or about April of 1987, Nguyen instructed Emily Grothe to charge 40% of her work to the YIN/DOE contract.

8. In about December 1987, at a time when the YIN contract was being closed down, Abi-Ghanem instructed Emily Grothe to falsely charge 65 hours to the YIN account and to order EWA employees Ann Fossen, Maribeth Bacig, Shiyon Bradford-Cybyski, and Cathy Payne to falsely charge hours to the YIN account.

9. On or about December 31, 1987, Office Manager John Eberlin, under the direction of Nguyen, instructed Dianne Lorensen to change her work hours on the Minnesota Pollution Control Minneapolis Incinerator project to the YIN project and to inflate hours worked on the YIN project.

10. In about January 1988, Nguyen and Abi-Ghanem told their employees to work on a slide presentation and to charge their work hours to the YIN contract.

11. In about January 1988, Abi-Ghanem directed Sami Andrea to increase his work hours charged to the YIN contract for the period ending December 31, 1987 from 87 hours to 129 hours.

12. In about January 1988, Abi-Ghanem directed John Greer to replace all references to a "VAM3D" computer program and its creator, Hydrogeologic, Inc., with EWA reference codes and to charge his time for that work to the YIN project.

13. In about January 1988, Abi-Ghanem instructed Karlene French, who was then translating German-Swiss documents into English for the Electrowatt project, a private contract, to charge those hours to the YIN contract.

14. In about the first part of 1988, Abi-Ghanem asked Antoun Calash to make a Vam 3-D computer program work on EWA's computer and told Calash that this was for the YIN project when, in fact, the computer program was for the private Electrowatt contract.

15. On or about January 5, 1988, Office Manager John Eberlin, under the direction of Nguyen, told the employees in his work group to charge time they had spent on an Electrowatt project to the YIN contract.

16. On or about January 8, 1988, Nguyen signed COE Standard Forms 254 and 255, thereby representing to the Small Business Administration that EWA had 45 employees of various disciplines and representing that Nguyen and Abi-Ghanem were professional engineers.

17. In about January of 1988, Abi-Ghanem directed Mary Siedlicki and Ray Wuolo to charge time spent on an

Environmental Protection Agency proposal to the YIN contract.

18. On or about March 8, 1988, Abi-Ghanem directed Sami Andrea to prepare a memorandum concerning the implementation of Quality Assurance Procedures pertaining to a phase out of the DOE BWIP (YIN) project, and Abi-Ghanem instructed Andrea to back date the memo to January 15, 1988 to make it appear that EWA had been following contract termination instructions.

19. On or about August 19, 1988, Abi-Ghanem certified EWA's cost and pricing data relating to RFP No. DACW37-88-P-0057, to the SBA for another COE contract.

20. On or about August 19, 1988, Abi-Ghanem, using the title of Ph.D. and P.E., signed a cover letter to the Corps of Engineers.

21. On or about September 22, 1987, Nguyen, using the title of "Ph.D., P.E., President" signed a confirmation letter to the COE.

22. On or about October 14, 1988, Nguyen ordered Sami Andrea, Patricia McGee, Bonnie Blake and Ann Morin-Jansen, to charge Benham-Holway Group proposal work to the YIN contract.

23. In or about November of 1988, Abi-Ghanem altered the October work hour report of Sami Andrea by increasing the work hours charged to the YIN contract by 36 hours.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

/s/ Illegible
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-90-118

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	PLEA AGREEMENT
v.	)	
GEORGES VICTOR ABI-GHANEM,	)	
Defendant.	)	

The United States represented by its attorneys Jerome G. Arnold, United States Attorney for the District of Minnesota and Jeanne J. Graham, Assistant United States Attorney, on the one hand, and defendant Georges Victor Abi-Ghanem, represented by Kevin Short, Esq. on the other hand, do hereby agree to resolve this case prior to trial on the following terms:

BACKGROUND

EWA, Inc. is a Minnesota Corporation providing engineering consulting services. Defendant Vietchau Nguyen is President of EWA and Defendant Georges Abi-Ghanem is Vice President. From October of 1984 through October of 1987, defendants engaged in conduct for the purpose of deceiving certain federal agencies to enter contracts and as to the work performed under those contracts. The agencies involved were the Department of

Energy (DOE), Army Corp of Engineers (COE) and the Small Business Administration (SBA).

To execute the scheme against the COE, defendants caused checks to be mailed via the United States Postal Service. Additionally, defendants committed at least one overt act as listed in the amended indictment for the purpose of furthering their plan to defraud the DOE, COE and SBA.

AGREEMENT

1) Defendant agrees to plead guilty to count 9 of the indictment charging defendant with mail fraud and a one-count information charging defendant with conspiracy to defraud the government.

2) Defendant understands that each offense carries a maximum sentence of five years in prison, a $250,000 fine or both, and up to five years probation.

3) The parties agree that the offense conduct occurred prior to November 1, 1987. Therefore, the Sentencing Reform Act of 1984 does not apply.

4) The United States will dismiss the remaining counts of the indictment at the time of sentencing.

5) The parties agree that restitution will not be included as a term of the sentence in this criminal matter. However, nothing in this plea agreement will prevent the recovery or attempted recovery of restitution or penalties through appropriate civil proceedings.

6) Defendant understands that the government may seek the imposition of costs for the prosecution of defendant, subject to defendant's ability to pay any costs.

7) There is no agreement as to the imposition of a fine, if any.

Dated:

Respectfully submitted,

JEROME G. ARNOLD
United States Attorney

BY: JEANNE J. GRAHAM
Assistant United States Attorney
Attorney ID No. 167368

Dated:

_____
Kevin Short, Esq.
Attorney for Defendant

Dated:

_____
GEORGES VICTOR
ABI-GHANEM
Defendant

[p. 1] UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, Plaintiff, vs. Georges Victor Abi-Ghanem, Defendant.	CRIMINAL 4-90-118 (2) Minneapolis, Minnesota November 30, 1990 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
(Guilty Plea)

BEFORE THE HONORABLE HARRY H. MacLAUGHLIN, UNITED STATES DISTRICT JUDGE.

APPEARANCES:

On behalf of plaintiff: Jeanne J. Graham

On behalf of defendant: Kevin J. Short
(Defendant was present.)

Also present: Jane McPhillips,
Probation Office.

Court Reporter: Karen J. Grufman
552 U.S. Courthouse
Minneapolis, MN 55401

[p. 2] THE COURT: Ms. Graham?

MS. GRAHAM: Good morning, Your Honor. The first case on the calendar is United States versus

Georges Victor Abi-Ghanem. Mr. Abi-Ghanem is here today with his attorney, Kevin Short.

MR. SHORT: Good morning, Your Honor.

THE COURT: Good morning, Mr. Short.

MR. SHORT: My client and I are in court today, and Mr. Abi-Ghanem is prepared to change his plea.

THE COURT: Okay, do you want to make some statement on the plea agreement, or whatever?

MS. GRAHAM: Yes, Your Honor. The parties have reached a plea agreement in this case. Would the Court wish for me to read that on the record?

THE COURT: Well, before you do that, you have reached a plea agreement for this defendant, and this defendant is here to plead. Is that right?

MS. GRAHAM: That's correct, Your Honor.

THE COURT: All right. Mr. Abi-Ghanem, you have entered a plea agreement with the government, have you?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Have you discussed that plea agreement with your attorney?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand the terms of the [p. 3] agreement?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And you are in agreement with it. Is that right?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay. I am going to have the Assistant United States Attorney read the plea agreement for the record here in court this morning. And as she reads it, I want you to listen. And when she finishes reading it, I am going to ask you if that's the agreement that you have arranged and agreed to. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay, do you want to go ahead?

MS. GRAHAM: Yes, Your Honor. The United States represented by its attorneys Jerome G. Arnold, United States Attorney for the District of Minnesota, and Jeanne Graham, Assistant United States Attorney on the one hand, and defendant Georges Victor Abi-Ghanem, represented by Kevin Short on the other hand, do hereby agree to resolve this case prior to trial on the following terms:

First of all, background;

EWA, Inc. is a Minnesota corporation providing engineering consulting services. Defendant Vietchau Nguyen is president of EWA, and defendant Georges Abi-Ghanem is vice president. From October of 1984 through October of 1987, defendants engaged in [p. 4] conduct for the purpose of deceiving certain federal agencies to enter contracts and as to the work performed under those contracts. The agencies involved were the Department of Energy, Army Corps of Engineers, and the Small Business Administration.

To execute the scheme against the COE, Army Corps of Engineers, defendant caused checks to be mailed via the United States Postal Service. Additionally, defendants committed at least one overt act as listed in the amended indictment.

And I must say, Your Honor, at this point the plea agreement should read, "as listed in the information."

THE COURT: All right. Mr. Short, do you see do that?

MR. SHORT: Yes, I do, Your Honor.

THE COURT: So the words"amended indictment" would be stricken, and the word "information" would be inserted therefore? Is that right?

MR. SHORT: Correct, Your Honor.

MS. GRAHAM: And Your Honor, at this time what I will do, while we are here right at this moment, I will cross out "amended indictment" in the original. I will print "information," and I will initial that change.

Mr. Abi-Ghanem, will you initial where I have put "information"?

DEFENDANT ABI-GHANEM: (Indicates).

[p. 5] MS. GRAHAM: Thank you, sir. And his attorney will also initial that.

Unfortunately, Your Honor, I realize that we will have to do that for each of the defendants. I apologize for that. I tried to make all the corrections this morning.

Continuing: Listed in the information for the purpose of furthering their plan to defraud the DOE, COE and SBA.

This is the agreement:

1. Defendant agrees to plead guilty to Count IX of the indictment charging defendant with mail fraud, and a one-count information charging defendant with conspiracy to defraud the government.

2. Defendant understands that each offense carries a maximum sentence of five years in prison, a $250,000 fine, or both, and up to five years probation.

3. The parties agree that the offense conduct occurred prior to November 1, 1987. Therefore, the Sentencing Reform Act of 1984 does not apply.

4. The United States will dismiss the remaining counts of the indictment at the time of sentencing.

5. The parties agree that restitution will not be included as a term of the sentence in this criminal matter. However, nothing in this plea agreement will prevent the recovery or attempted recovery of restitution or penalties through appropriate civil proceedings.

[p. 6] 6. Defendant understand that the government may seek the imposition of costs for the prosecution of defendant, subject to defendant's ability to pay any costs.

7. There is no agreement as to the imposition of a fine, if any.

The original has been signed by myself, by Mr. Short, and by Mr. Abi-Ghanem this morning.

THE COURT: Mr. Abi-Ghanem, did you listen to that agreement as it was read?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And that is the agreement as you understand it. Is that right?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Would you administer an oath to the defendant, please?

(The defendant was duly sworn.)

THE COURT: Would you give your address, Mr. Abi-Ghanem?

DEFENDANT ABI-GHANEM: It's 400 Natchez Avenue South, Golden Valley, Minnesota. The Zip Code is 55416.

THE COURT: And how old are you, sir?

DEFENDANT ABI-GHANEM: Thirty-six.

THE COURT: And what education have you had? How far have you gone in school?

DEFENDANT ABI-GHANEM: I completed my Master's degree [p. 7] at Stanford University, and my Doctorate degree at Princeton University.

THE COURT: In what subject?

DEFENDANT ABI-GHANEM: My area of expertise is continuum physics in the school of engineering and applied sciences.

THE COURT: Okay. Stand right up to that – push that microphone up a little bit, would you?

Okay. As you stand here in court this morning, is your mind free and clear? Are you under the influence of any drugs or intoxicating liquor of any kind?

DEFENDANT ABI-GHANEM: No.

THE COURT: Do you claim any mental problem of any kind?

DEFENDANT ABI-GHANEM: No.

THE COURT: Mr. Short, based on your contacts with your client, is he mentally competent and able to understand the charges against him, and his right to a trial, and the other rights he has, and the concept of pleading guilty?

MR. SHORT: I'm sure that he is, Your Honor.

THE COURT: Have you had ample opportunity to discuss the charges against you with Mr. Short, and to discuss with him your right to a trial, and your other rights, and to discuss with him the act of pleading guilty, and so on?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

[p. 8] THE COURT: Are you satisfied with the representation that you have received from Mr. Short as your lawyer?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that the penalty in the statute for the crime charged in Count IX is a period of imprisonment of up to five years, a fine of up to $250,000, or both, plus up to five years of probation? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And that there is also a mandatory special assessment of $50. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that the penalty provided by the statute for the crime contained in the information is a maximum sentence of up to five years, a fine of up to $250,000, or both, and up to five years probation? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And a mandatory special assessment of $50. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Now, there is an information involved here, Counsel. I think you better go through the proper questioning about that.

MS. GRAHAM: Yes, Your Honor.

[p. 9] Mr. Abi-Ghanem, do you understand that as part of this plea agreement we are charging you with conspiracy, different dates, however, than what is in the indictment? Do you understand that?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And you have the right, however, when pleading to an information, you always have a right to have any charge brought to the Grand Jury first. Do you understand that?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And as was done in the original indictment –

MR. SHORT: (To the defendant:) Speak up so this lady can hear you.

MS. GRAHAM: As was done with the original indictment, you would have the right to have this charge, which is in the information, conspiracy from October 1 of '84 to October 31 of '87, brought before a Grand Jury also. Do you understand that?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And in that Grand Jury, at least twelve persons would have to agree that you were – that there was enough evidence to return an indictment.

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And at this time, with that [p. 10] understanding, you are choosing to waive the indictment for this particular charge, and to plead guilty to this information?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And have you gone over this with your attorney?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: And at this time, you have signed a Waiver of Indictment form? Is that correct?

DEFENDANT ABI-GHANEM: Yes.

MS. GRAHAM: Your Honor, we have tendered the signed Waiver of Indictment form, signed by Mr. Abi-Ghanem and Kevin Short.

THE COURT: All right.

MS. GRAHAM: (indicates).

THE COURT: Do you understand the charge that's been brought against you in the information?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that it involves a charge that you have been part of a conspiracy to defraud the government and to use the mails to defraud? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that you have the right to have the matter of whether or not that conspiracy [p. 11] charged in the manner in which it's contained in the information, whether or not that is brought against you, you have the right to have that presented to a Grand Jury. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that a Grand Jury consists of 23 people, and that it takes 16 people to constitute a quorum of the Grand Jury? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that the Grand Jury would have to find probable cause to believe that you violated the law before you could be brought into court on these charges? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand it takes a majority vote of the Grand Jury, that is, twelve out of the 23, in order to return an indictment?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that you have an absolute right to have this matter presented to a Grand Jury? Do you understand that?

DEFENDANT ABI-GHANEM: Yes.

THE COURT: And you talked to your lawyer about that, have you?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

[p. 12] THE COURT: And you have decided to waive your right, to give up your right to have it presented to a Grand Jury. Is that right?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay. Now, you also are entitled to have the information read allowed in court, or else waive the reading, and I guess I am just going to read it. I am going to read for you what the information is so that I know that you are familiar with it and that you have heard it. All right?

DEFENDANT ABI-GHANEM: Okay.

THE COURT: It's entitled, "United States District Court for the District of Minnesota, United States of America, Plaintiff, versus Vietchau Van Nguyen, Georges Victor Abi-Ghanem, and EWA, Incorporated, Defendants.

"The United States Attorney charges that on or about October 1, 1984 and continuing through October 31, 1987,

in the District of Minnesota, the defendants," including yourself – do you have it in front of you now?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: All right. "Did willfully and knowingly combine, conspire, and agree together and with other persons known and unknown to the Grand Jury, to defraud the United States, its agencies and departments, namely the Department of Energy, the Department of the Army, and the Small Business Administration, and to commit offenses against the United [p. 13] States, more particularly:

"A. To violate Title 18, U.S. Code, Sections 1341 and 1343 by willfully and knowingly using and causing the mails and wires to be used in the execution of the scheme and artifice to defraud, which is set forth more fully in paragraphs one through 18 in Count I of" – well, it says 'this indictment.' It seems to me that language is not appropriate.

MS. GRAHAM: That's correct, Your Honor. I am seeing what's happening. We took the language straight out of the indictment, is what happened. What we could – what we can –

THE COURT: I would think you would say of the indictment filed herein by the Grand Jury on whatever date it was.

MS. GRAHAM: That's correct, Your Honor. That would be easy to change.

THE COURT: Is that agreeable, Mr. Short?

MR. SHORT: Yes, Your Honor.

THE COURT: Do you understand that, Mr. Abi-Ghanem?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay, and continuing: "Which is set forth more fully in paragraphs one through 18 of Count I of the indictment herein, which was filed on," and the date will be provided, "which paragraphs are incorporated by reference herein.

"B. To violate Title 18, U.S. Code, Section 1001, and [p. 14] Title 15, U.S. Code, Section 645(a), by willfully and knowingly causing to be made and used false writings and documents submitted to the YIN, COE and SBA."

Now, those words, those initials stand for – what's the YIN?

MS. GRAHAM: Yakima Indian Nation, Your Honor.

THE COURT: All right. And COE is the –

MS. GRAHAM: Corps of Engineers.

THE COURT: Corps of Engineers. And the SBA is the Small Business Administration.

MS. GRAHAM: That's correct. And the DOE is the Department of Energy.

THE COURT: "In connection with obtaining contracts for which they were not qualified and obtaining money from the YIN and COE to which they were not entitled.

"Overt Acts: In furtherance of the conspiracy and to accomplish its objectives, Vietchau Van Nguyen, Georges

Victor Abi-Ghanem, and others, did commit in the District of Minnesota the following overt acts:

"1. In or about October 1984, Georges Abi-Ghanem traveled to his home in Lebanon and charged 164 hours of work to the YIN/DOE contract while there for personal reasons.

"2. On or about January 10, 1986, Nguyen signed COE contract number DACW37-86-D-0014 as the president of EWA, Inc.

"3. In 1986 and 1987, the defendants caused to be [p. 15] presented false claims to the COE for money under the 1986 COE contract because the invoices submitted as claims were based on false information about EWA's employees and pay scales.

"4. In or about March of 1986, of Abi-Ghanem altered the timesheet of John Seaberg and charged Seaberg's work on a private contract, CH2MHill Company contract to the YIN/DOE contract.

"6. In or about February 1987, Abi-Ghanem instructed employee Amal Djerrari to charge one-half of his time spent on an unrelated 'NSF' project to the YIN/DOE contract.

"7. In or about April of 1987, Nguyen instructed Emily Grothe to charge 40 percent of her work to the YIN/DOE contract.

"All in violation of Title 18, United States Code, Section 371."

Do you understand those charges against you, sir?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And whey they use the terms YIN and COE and SBA, do you know what they are talking about?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay. Because they are not spelled out as such. They are given, but it doesn't have that sort of code following it.

Okay, and you are here this morning to plead guilty to that information and, in addition, to plead guilty to one of [p. 16] the counts in the original indictment. Is that right?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Okay. By the way, Mr. Abi-Ghanem, you are under oath, and should you falsely answer any questions you could be charged with perjury. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Also, if any questions are asked of you here this morning that you don't understand, please be sure to indicate that you don't understand, because I don't want you to try to answer a question that you don't understand. Okay?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Just for the record, you have no problem understanding English or speaking English. Right?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Were you born in the United States?

DEFENDANT ABI-GHANEM: No, Your Honor.

THE COURT: But your English is excellent. Is that a fair statement?

DEFENDANT ABI-GHANEM: I hope so.

THE COURT: Okay. Now, you understand that you are not required to plead guilty to these charges?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that if you persist in the pleas that you previously entered of not guilty, you are entitled to a trial before a jury of twelve persons on the [p. 17] question of whether you are or are not guilty? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that at that trial you would be presumed to be not guilty of these charges, and it would be up to the government to prove, with its witnesses and its evidence, beyond a reasonable doubt, to the satisfaction of each of the twelve jurors, that you were, in fact, guilty? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that at that trial you would be entitled to be represented by a lawyer, and if you couldn't afford to hire a lawyer, one would be appointed to act on your behalf by the Court

and paid for by the government? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do you understand that your lawyer at that trial could cross-examine and otherwise attack evidence presented against you? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that at that trial you could not be required to take the witness stand and testify, since under our American Constitution you cannot be required to testify against yourself? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

[p. 18] THE COURT: Do you understand that at that trial you would not be required to present any evidence of any kind? You could sit quietly throughout the entire trial, and you would be clothed with the presumption of innocence, and it would be up to the government to move forward with the burden of proof to show, to the satisfaction of each of the twelve jurors, that you were, in fact, guilty. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Do you understand that at that trial, if you chose to do so, you could take the witness stand yourself? You wouldn't be required to, but if you wanted to you could testify on your own behalf. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And at that trial you could present other witnesses and other evidence on your own behalf if you wanted to do so. Do you understand that?

DEFENDANT ABI-GHANEM: Yes.

THE COURT: And do you understand that by pleading guilty here this morning you give up your right to the trial that I have just described, that you will be adjudged guilty as to these two counts here this morning in this courtroom based upon your pleas? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: There will not be a trial. Do you understand that?

[p. 19] DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And you also give up your right to stand silent, since you will be asked questions this morning about the crimes and your role in them, and you will be required to answer those questions. Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And do understand – well, let me ask this question: Has any force or have any threats been used with or against you to get you to come into court here this morning and plead guilty?

DEFENDANT ABI-GHANEM: No, Your Honor.

THE COURT: Have any promises been made to you in connection with this plea, other than the plea agreement that was just read?

DEFENDANT ABI-GHANEM: No, Your Honor.

THE COURT: Do you understand that what the sentence shall be, within the maximum sentences that I just told you about a few minutes ago, what the sentence shall be on each of those counts is entirely up to me as the Judge in this case? Do you understand that?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Has anyone purported to tell you what those sentences will be that I give in this case? Has anyone said, "Look, I know what that judge is going to do," or anything like that?

[p. 20] DEFENDANT ABI-GHANEM: No, Your Honor.

THE COURT: Okay. Are you here then this morning to plead guilty because after thinking it over, and talking to your lawyer, and considering it very carefully, it seems to you to be the best course for you to follow at this stage?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: All right, Mr. Short, are you going to be the one who goes into the elements and facts of these crimes?

MR. SHORT: Yes, Your Honor.

THE COURT: All right, do you want to do that?

MR. SHORT: Mr. Abi-Ghanem, you know that the two counts that you are entering a plea to, that you are essentially talking about two contracts that your company, EWA, had with, on the one hand, the Army Corps of Engineers; and secondly, the Yakima Indian Nation, a contract that was funded by a grant from the Department of Energy? Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: Now, with respect to Count IX of the indictment that you are pleading guilty to, that count is a mail fraud count that relates to the Corps of Engineers. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you know that it charges you with causing a mailing of a check from the Corps of Engineers on October 27, 1987. Correct?

[p. 21] DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: Now, with respect to that Corps of Engineers contract, there were certain things that you and your company were involved in that represented both misrepresentations of qualifications and misrepresentations of number of hours that under the law might be deemed to be a scheme or an artifice to defraud. Do you understand that? And we have talked about that. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And among those misrepresentations with respect to the Corps of Engineers contract, you know that there is something called a form 254/255,

which is an application used by the Corps of Engineers whereby businesses like yours apply to obtain business. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And the specific form 254/255 that we're talking about was, on the Corps of Engineers contract, was actually filled out by Mr. Nguyen's predecessor, a man by the name of Viet, V-i-e-t, Ngo, N-g-o. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: Now, you became aware of the way that he filled out that application. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you are aware of the way that that form 254/255 was filled out before the company was involved in [p. 22] the negotiations that eventually resulted in the contract that is called into question by Count IX of the indictment. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: Now, among the misrepresentations that you knew that were contained in that form 254/255, there were misrepresentations with respect to the experience or qualifications of some of EWA's employees. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And there were also misrepresentations with respect to the number of employees. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And in that vein, there were some employees, people listed there who in fact were not employees of EWA, and some of whom that you had never heard of before. Is that correct?

DEFENDANT ABI-GHANEM: Yes, some of them I have never seen before.

MR. SHORT: Also, during the course of your responsibilities with respect to that contract, you became aware that certain hours submitted by Viet Ngo were, in fact, not legitimate hours, and should not have been contained within that, within the vouchers sent on this contract. Correct?

DEFENDANT ABI-GHANEM: Yes, I reviewed those hours, and I have should not have allowed those hours to be billed out [p. 23] to the Corps of Engineers.

MR. SHORT: Knowing all of these misrepresentations to have taken place, you could have done something and rectified that situation. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: But you did not?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And with respect to Count IX, on November – I'm sorry, on October 27, 1987, a check for $2,052.49 was sent by the Corps of Engineers to EWA pursuant to a number, or all of those misrepresentations?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you agree that whatever action took place at about that time to cause that mailing was done within the District of Minnesota?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: Now, with respect to the information that you have entered a plea of guilty to the conspiracy count, you understand that it alleges that you and EWA and Mr. Nguyen entered into a, along with other people known and unknown, entered into a conspiracy to defraud the United States government during a period of time, approximately a three-year period of time from October until – from October of '84 until October of '87. Correct?

DEFENDANT ABI-GHANEM: Yes.

[p. 24] MR. SHORT: And during that period of time, there was, EWA was involved in a rather large contract with the Yakima Indian Nation, also known as YIN, which was funded by a grant provided by the United States Department of Energy. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And, now, there were a number of similar inaccuracies with respect to hours that were applied towards that contract that you became aware of but did not rectify. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And among those were the fact that again you know that Viet Ngo billed some hours to that contract that had not properly been authorized, and yet you allowed them to be passed through. Correct?

DEFENDANT ABI-GHANEM: Yes, some of the hours were not authorized under the scope of our guide.

MR. SHORT: Now, there is also an area of work that you were doing for the YIN called defense waste work, or the Defense Waste Project, if you will. And you know that some defense waste hours were applied to the YIN/DOE grant when, in fact, they should not have been. Correct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: In 1985 to '86, did you – are you aware that in 1985/86, some hours from other projects, other than the [p. 25] YIN, got applied to the YIN/DOE moneys?

DEFENDANT ABI-GHANEM: Yes, I'm aware of other projects, one project, the CH2MHill project.

MR. SHORT: Okay. Now, that was what the Judge read from the indictment, and that was a project called CH2MHill. Correct?

DEFENDANT ABI-GHANEM: Yes, that's correct.

MR. SHORT: And some of those hours from that project got applied to the YIN/DOE?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you failed to rectify that situation?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you also became aware that a clerical employee whose name was Christy Junroth, J-u-

n-r-o-t-h, was applying 25 percent of her hours across the board to this contract, and that resulted in some hours being applied to the contract that should not have been?

DEFENDANT ABI-GHANEM: Yes, some of the hours were billed wrongfully.

MR. SHORT: And finally, did you become aware that in 1986 some quality assurance work that was being done by your company was applied to the contract, that is, the YIN/DOE contract, and that was beyond the scope of that contract and it should not have been done?

DEFENDANT ABI-GHANEM: Yes, the quality assurance [p. 26] work was not within the scope of work approved by the YIN and the Department of Energy.

MR. SHORT: Now, based on that conduct, you are willing to concede here and admit to Judge MacLaughlin and thi [sic] Court that based on that conduct, that you and Mr. Nguyen had an agreement to defraud the United States Government, that is, get some moneys that EWA was not entitled to through that course of conduct?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you agree that as between the two of you, you committed at least one of the overt acts that are named in the, that are listed out now in the information and in this conspiracy count?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: And you agree that that course of conduct took place in the three-year period from October of '84 to October of '87 in the District of Minnesota?

DEFENDANT ABI-GHANEM: Yes.

MR. SHORT: I have nothing further, Your Honor.

THE COURT: And you also agree, I take it, that you performed these acts voluntarily and intentionally? Is that true?

DEFENDANT ABI-GHANEM: Yes.

THE COURT: All right.

MS. GRAHAM: The government has nothing further, Your [p. 27] Honor.

THE COURT: Okay. Have you understood each of the questions that have been asked of you here this morning?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: And have the answers that you have given to those questions been true and correct?

DEFENDANT ABI-GHANEM: Yes, sir. Your Honor, sometimes I was intentional, sometimes I knew it was for the profit. I knew the company would benefit from those mischarges to our clients.

THE COURT: Okay. Have you had enough time to visit with your lawyer? Do you want any more time to talk to your lawyer before you enter your pleas of guilty?

DEFENDANT ABI-GHANEM: No, Your Honor.

THE COURT: Do you now then plead guilty to Count IX of the indictment, and plead guilty to the conspiracy charge contained in the information which has been filed with the U.S. Attorney?

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: All right, since you acknowledge that you are, in fact, guilty as charged in Count IX of the indictment, and since you acknowledge that you are, in fact, guilty as charged in the information, and since you know your right to a trial and the other rights I have described to you, and since you know the maximum possible punishment that might be imposed, [p. 28] and since it's clear to me that your pleas here this morning are free and voluntary and knowing pleas on your part, I am going to accept your plea of guilty to Count IX of the indictment, and your plea of guilty to the information, and judgments of guilty will be entered against you now as to each of those two crimes.

I am going to refer the matter to the Probation Department of the Federal Courts. One of its officers is here in the courtroom.

Their job will be to prepare a presentence investigation report, which is a typewritten report consisting of several pages, intended to assist me in determining what the sentence should be, and gives me your background and your history and other facts.

When that report is prepared, your attorney will be notified, and both you and he should read the report to see if you think it's accurate. If you think it isn't accurate, there is a form you can use to let me know that.

DEFENDANT ABI-GHANEM: Yes, Your Honor.

THE COURT: Anything further?

MS. GRAHAM: No, Your Honor. The government has no objection to continuing with the current bond situation.

THE COURT: Okay, that may continue.

Was there some question about a picture of one of these defendants? Is that this defendant?

[p. 29] MS. GRAHAM: No, Your Honor, I believe that's Mr. Nguyen.

THE COURT: Okay. All right, sir. Anything further, Mr. Short?

MR. SHORT: No, Your Honor.

MS. GRAHAM: Your Honor, at this time, formally I will tender to the Court the original plea agreement that has been signed by all parties.

THE COURT: All right.

MS. GRAHAM: (Indicates).

REPORTER'S CERTIFICATE

I, Karen J. Grufman, hereby certify that the foregoing 29 pages is a true and correct transcript of my original stenograph notes taken at the time and place indicated.

/s/ Karen J. Grufman
Karen J. Grufman
Official Court Reporter

United States District Court
_____District of Minnesota

UNITED STATES OF AMERICA

V.

Georges Victor Abi-Ghanem

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November 1, 1987)

Case Number: Cr. 4-90-118 (2)

Kevin Short
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 9 of the indictment and a one-count information.

_ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 1341 & 2	Mail fraud	10/27/87	9
18 371	Conspiracy to defraud the U.S. Dept. of Energy, the Dept. of the Army and the Small Business Administration	10/31/87	1 (information)

_ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

X Count(s) 1-8 and 10-25 (is)(are) dismissed on the motion of the United States.

IT IS THE JUDGMENT OF THIS COURT THAT: As to Count 9 of the indictment, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of 18 months. As to the one-count information, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of 18 months to be served concurrently with the sentence of imprisonment imposed as to Count 9 of the indictment.

The Court finds that the United States Department of Energy, the Department of the Army and Small Business Administration are victims of the defendant's offense within the meaning of the Victim and Witness Protection Act. However, pursuant to the plea agreement, the issue of restitution is left to any civil proceedings.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on May 21, 1991.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant:

1) shall not commit another federal, state or local crime.

2) shall not leave the judicial district without the permission of the court or probation officer;

3) shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) shall support his or her dependents and meet other family responsibilities;

6) shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) shall pay any fine or obligation imposed by this judgment.

16) shall not possess a firearm or destructive device.

X IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $100.00, for count(s) 9 and 1, which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

X The court orders commitment to the custody of the Attorney General and recommends: a Federal Correctional Institution in the state of Minnesota as the place for service of the sentence.

Defendant's Soc. Sec. No.: 526-69-7051
Defendant's Date of Birth: 2/16/54
Defendant's Mailing Address:
400 Natchez Avenue South
Golden Valley, MN 55416

Defendant's Residence Address:
Same as above

April 9, 1991
Date of Imposition of Sentence

/s/ Harry H. MacLaughlin
Signature of Judicial Officer

Judge Harry H. MacLaughlin
Name & Title of Judicial Officer

4-17-91
Date

RETURN

I have executed this judgment as follows:

Defen~~dent delivered on~~ Illegible 5/21/91 to Illegible at _____ with a certified copy of this judgment.

/s/ Illegible
United States Marshal

By /s/ Illegible
Deputy Marshal

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,

Plaintiff,

v.

Georges Victor Abi-Ghanem,

Defendant.

CRIM.
4-90-118(02)

MEMORANDUM AND ORDER

Jerome G. Arnold, United States Attorney, and Jeanne Graham, Assistant U.S. Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, for plaintiff.

Georges V. Abi-Ghanem, P.O. Box 1000-609, Duluth, MN 55814, pro se.

The Court had received a letter from the defendant dated August 3, 1991. The letter was filed on August 7, 1991, and is being considered by the Court to be a motion for reduction or modification of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Based upon all the files, records, proceedings and other data submitted to the Court, the Court is satisfied that the sentence as originally imposed was, and continues to be, appropriate under all of the circumstances.

Accordingly, **IT IS ORDERED** that the defendant's motion for a reduction or modification of sentence be and same hereby is in all things denied.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin

United States District Court

FILED SEP 24 1991
FRANCIS B. DONATE, CLERK

BY /s/ Illegible
DEPUTY

DATED: September 24, 1991

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255
TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
BY A PERSON IN FEDERAL CUSTODY

Explanation and Instructions – Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute form AO 240 or any other form required by the court, setting forth information

establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the original and at least two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION UNDER 28 USC § 2255
TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court
District MINNESOTA
Name of Movant GEORGES VICTOR ABI-GHANEM
Prisoner No. 04680-041
Case No. 4-90-118(2)
Place of Confinement
Federal Prison Camp – Duluth, Minnesota

UNITED STATES OF AMERICA V.
GEORGES VICTOR ABI-GHANEM
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S. DISTRICT COURT, MINNEAPOLIS, MINNESOTA

2. Date of judgment of conviction NOVEMBER 30, 1990

3. Length of sentence Eighteen Months

4. Nature of offense involved (all counts) See attached motion

5. What was your plea? (Check one)
   (a) Not guilty ___
   (b) Guilty xx
   (c) Nolo contendere ___

   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ___
   (b) Judge only ___

7. Did you testify at the trial?
Yes _ No x

8. Did you appeal from the judgment of conviction?
Yes _ No x

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes x No _

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court U.S. DISTRICT COURT, MINNEAPOLIS, MINNESOTA

(2) Nature of proceeding RULE 35 MOTION

(3) Grounds raised Reduction of Sentence based on additional evidence to Court

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _ No x

(5) Result Denied

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court U.S. COURT OF APPEALS

(2) Nature of proceeding Appeal of Denial of Rule 35 Motion

(3) Grounds raised Same as in Rule 35

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes __ No xx

(5) Result Pending

(6) Date of result

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes x No _
(2) Second petition, etc. Yes _ No. _

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

    CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement proceeded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: ALL GROUNDS ARE PROVIDED IN "STATEMENT OF ISSUES UNDER CONSIDERATION" IN THE "MEMORANDUM OF LAW" (SEE ATTACHMENT)

Supporting FACTS (state *briefly* without citing cases or law) SEE ATTACHED MOTION WITH SUMMARY OF FACTS INCLUDED. FOR MORE DETAILED STATEMENT OF SUPPORTING FACTS, SEE AFFIDAVIT OF GEORGES V. ABIGHANEM AND VIETCHAU V. NGUYEN.

B. Ground two: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

D. Ground four: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

_____

_____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes x No _

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing KEVIN J. SHORT

(b) At arraignment and plea KEVIN J. SHORT

(c) At trial

(d) At sentencing KEVIN J. SHORT

(e) On appeal pro se

(f) In any post-conviction proceeding pro se

(g) On appeal from any adverse ruling in a post-conviction proceeding pro se

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes xx No __

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes __ No xx

(a) If so, give name and location of court which imposed sentence to be served in the future: _

_____

_____

(b) Give date and length of the above sentence: _

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes _ No x

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

June 18, 1992

(date)

/s/ Georges V. Abi-Ghanem

Signature of Movant

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,	)	**U.S.D.C. No.**
Plaintiff,	)	**4-90-118-02**
	)	
v.	)	
GEORGES V. ABI-GHANEM,	)	
	)	
Defendant.	)	

AFFIDAVIT OF GEORGES VICTOR ABI-GHANEM

GEORGES V. ABI-GHANEM, being first duly sworn, deposes and states as follows.

1. I am the defendant in the above entitled action, and was aware of factual evidence and unusual circumstances which were never made known to the Court prior to my sentencing.

2. In 1976, I left Lebanon and came to the United States for my graduate studies. In

* * *

7. Illegal search and seizure, as the "things to be seized" have not been particularly described prior to and after the search, and as the basis for the seized scientific materials is the ideas which they contain;

8. Government's failure to comply with the request for Brady material;

9. Government misconduct;

10. Failure of the Court and the prosecution to analyze, with respect to both intent of Congress in the Nuclear Waste Policy Act (NWPA) and the United States Treaty with the Yakima Indian Nation (YIN), the nature of the Petitioner's involvement, agreement, and direct accountability to YIN Tribal Council,

    and

    to resolve and construe doubts to the Intent of Congress in the NWPA and the Treaty between the Yakima Indian and the United States, in favor of the Indians and as the Indians understood their meaning.

11. Sentencing court's reliance upon erroneous information contained in Pre-sentence investigation report; and

12. Sentencing court's erroneous denial of a Rule 35 Motion.

The government has based most of its case regarding the YIN on its claim that EWA records and statements of former EWA employees that the monthly timesheets of employees (which were transferred to spreadsheets for each project) did not "match" monthly billings. On occasion, EWA employees worked on the YIN projects for hours in a given month that were not billed until a later month. Employee hours may not have been billed at the end of a given month for one of the following reasons:

1. The employee's hours exceeded the number of hours permitted to be billed in a given month pursunat [sic] to the contractual arrangement with YIN.

2. The employee's hours were part of services rendered which were to be included in a report or progress report (deliverables) to YIN for which the balance of the work had not been completed. (EWA did not bill employee hours until a report or progress report was delivered relating to those hours).

3. The hours had to be recorded as noncharge-able hours.

Those hours were carried forward and billed when permitted. Thus, the timesheets for employees did not "match" the billings in every month. YIN and DOE were aware of EWA's practice. YIN auditors, as approved by DOE, had audited more than $1,000,000.00 of billings using that practice. The difference in time was reflected on spreadsheets which the government seized. Those spreadsheets demonstarted [sic] the integrity of EWA billings and were explained to the government. Those spreadsheets demonstrated our innocence and were not produced prior to the set date of trial. The government never returned the spreadsheets although they were inventoried on the list of documents seized by the government. The government now states that "the government does not have the spreadsheets you requested" (See Jeanne Graham letter of February 20, 1991, included Appendix K).

A. PRESENTATION OF EVIDENCE CONTRADICTING ALL THE FACTUAL ELEMENTS OF THE PLEA AGREEMENT, THE INFORMATION COURT, AND COUNT IX, AND SHOWING:

1) COERCION AND INVOLUNTARINESS IN THE ADMISSSION [sic] OF GUILT; DEPRIVATION OF THE CHOICE TO DENY;

2) INEFFECTIVE COUNSEL;

3) KNOWINGLY INTRODUCTION AND ARGUING OF FALSE EVIDENCE BY PROSECUTOR;

4) ILLEGAL SEARCH AND SEIZURE, WITH DESTRUCTION OF EXCULPATORY MATERIAL;

4) PROSECUTOR MISCONDUCT; AND

5) ACTUAL INNOCENCE.

The information below was fully disclosed shortly after the indictment to my former legal counsel Kevin J. Short ("Short"), and to former legal counsels Mark W. Peterson ("Peterson") representing co-defendant Nguyen ("Nguyen") and David L. Warg (Warg") representing EWA, Inc. ("EWA"). All the attached documents supporting my statement have been kept with Short, and were recently obtained from him. I have always maintained my innocence, implicitly or explicitly (prior to entering the plea guilty, prior to sentencing, in my Rule 35 and related mtions [sic] to the Court of Appeals). I feel I was pushed to commit "perjury" under the pressure of the government, Short, and Peterson. I did not have any choice, particularly when I was deprived from the choice of denying all allegations against me, and any associated

criminal intent or behavior. I felt that there was a conspiracy against me which is so strong that I had no choice but to plead guilty with the hope to reverse my conviction and affirm my innocence.

This section provides the factual evidence supporting my innocence in regard to the only allegations I was pushed to plead guilty for, and demonstrates the lack of intention for any wrongdoing or criminal intent. The organization in this section will correspond to each element of the Information count and count 9 of the indictment.

Overt Act 1 [Count 1, INFORMATION]

The government states:

> "In or about October 1984, Georges Abi-Ghanem travelled to his home in Lebanon and charged 164 hours of work to the YIN/DOE contract while there for personal reasons."
>
> As I told Short consistently in all my conferences with him, this allegation is false for the following reasons:
>
> Fact 1 (Appendix A.1):
>
> Evidence: Lebanese passport.
>
> Explanation: In October 1984, I was only a resident of the United States. (I became a citizen in 1989). My only official travel document was my Lebanese passport (which Short and myself were the only people to be aware of). The passport indicates the following:
>
> - Date of Entry ("entree", in French) to the International Airport of Beirut (indicated as

"EAIB") stamped by the Lebanon General Security

* * *

C. ADDITIONAL FACTS FOR COUNSEL'S INEFFECTIVE ASSISTANCE

(APPENDIX I – INCLUDES SEVERAL ENCLOSURES)

In addition to all the facts provided in section A, there are a series of events which occurred prior to the guilty plea and prior to sentencing, and which need to brought to the Court's attention for the purpose of my guilty plea withdrawal.

1. At all times, my expression to Short was that I am innocent. There was no instance, I stated to him that I have committed intentionally and willfully any wrongdoing. Even after the guilty plea was entered, he made a statement to me that "only he knows I am innocent". I wrote a letter (September 5, 1991) from my place of incarceration reminding him his statement (Appendix I). Furthermore, in his May 8, 1992 letter, Shortly clearly states: "You did not reach your decision to plead guilty until the evening before the day set for trial. Up until that evening, you had been telling me for six months that you were completely innocent of any wrongdoing and that I must diligently prepare the case for trial. I followed your instructions." (Appendix I)

2. Approximately four days before the set date of trial, I recall there was a meeting at the U.S. Attorney's office between Short, Peterson, Warg, and the prosecutor. I was

not informed that such a meeting was taking place, neither did I know the purpose. I found out of the meeting while I was at Peterson's office going over the documents that were provided to him by the government, and organizing the documents he received during that day as a result of our discovery. My other task was to go over the entire spreadsheets and calculate the exact dollar of unbilled hours to YIN. During that time, I recall that Nguyen called to talk to his former counsel, and then asked to talk to me since he knew I was at his counsel's office working on establishing the dollar amount of unbilled hours, to confirm our claim of innocence. It was my impression from our discussion that he also did not know of such a meeting, and I do not recall having elaborated on this matter any with him any further since my mind was more on figuring out the spreadsheets rather than something else. I remember that I told Nguyen that there were several spreadsheets missing, and others I could not read or figure out because of the unclear accounting method of Viet Ngo. As I continued working on the organization of the materials and the preparation of the trial, Nguyen came down in an attempt to help me and to meet with his counsel. He was not of much help to me since he, too, was not involved in Ngo's duties at EWA. Furthermore, I told Nguyen that there were a large number of spreadsheets missing, and that I was unable to come up with any accurate estimate of the unbilled YIN work. Entire records used by YIN/DOE auditors in their past audit of EWA were suppressed from us. It was clear, after having checked the list of items seized and items that the documents were not returned. Furthermore, Nguyen and I discussed the need to have

the EWA computer records to track down the files related to the indictment. These records were also not in our possession, nor I was allowed to access to them during discovery. We concluded that we should bring those concerns immediately to the attention of our counsels, since these materials would constitute the basis of our defense which had been openly discussed with the prosecutor by attorney Gary Hansen (Nguyen's counsel, after the federal search warrant).

I thought that Nguyen would know about the meeting at the U.S. Attorney's office. He, like me, did not know what the counsel's meeting with the prosecutor was all about. Approximately around 5:30 PM, the three counsels returned. There was an open discussion between them, Nguyen and myself in the room where Nguyen and I were working. The picture they projected to us, contrary to the one we had a day earlier, was very gloomy even though all Jenks materials was already in their hands for a few days. Nguyen and I were very disturbed about the sudden change in their position towards us. They did not accuse us explicitly of being guilty, but their attitude was certainly not encouraging. There was a vigorous and repeated expression of our innocence to them, which they surely recognized.

Because of our frustration as a result of not having the spreadsheets records and other materials needed to accurately come up with the unbilled dollar amount on YIN projects, to show at trial the documents used by YIN/DOE auditors to approve our billing system and show our full compliance with the YIN/DOE requirements, Nguyen and I turned to the counsels and informed them about the suppressed materials, including

the inability to access our computer records. The counsels, surprisingly, stated that more material was still going to be delivered. Furthermore, Warg stated that he was going to follow up on the issue of computer records. This response, I found it then as I do now, very astonishing since the trial was going to take place in three days, and I and Nguyen (let alone them) could not possibly and humanly perform the review in the remaining short amount of a time. As a matter of fact, it took several weeks for the public accountants firm of Boyum and Barenscheer to perform their audit on the YIN projects, after we pled guilty.

During the entire meeting, I can vividly remember our strong expression of innocence, and our intent to go to trial. Not only so, Nguyen and myself told our counsels of our wish to be put on the witness stand. Their reply was that we might have to.

2. The next day, I came back to Peterson's office to continue my deciphering of the spreadsheet records (the copying was not always, clear, and the large paper size of EWA original sheets were copied in several pages which often times got mixed with periods that do not belong to them). The missing information that Nguyen and I pointed out to him the day before, was not in his office. I knew then that my calculations would be significantly scrutinized and may not stand in the Court of law because of the lack of the supporting documentation which I needed and which was still in the hands of the government.

3. As of three days before the trial, my counsel had not been able to review the material I obtained during discovery. I know he was overloaded with the materials in his hand, but, in my opinion, he needed to review the material in Peterson's office. I expressed to him that there was a number of crucial documents missing, but he seemed to ignore my concern raised one day earlier. I forced myself to not worry about the missing spreadsheet records, the computer files (which would provide significant indication and evidence about our lack of any criminal intent), among a number of other suppressed documents related to a number of overt acts. Though I knew, as a scientist accustomed not to ignore any minute technical detail in my line of work, that it was aserious [sic] mistake for Short not to allow himself the opportunity to examine the entire records at Peterson's office just for the sake of protecting my interest. I know there were many documents which clearly contradicted the overt acts stated in the information count and the plea agreement. It seems to me, that my contention that the unbilled dollar amount would show to the jury that there was a lack of any criminal intent on my part, became slowly an issue that Short and the other counsels were unwilling to pursue. No further action was taken by any counsel, to my knowledge, to follow up with this matter any further with either the Court or the prosecutor. I knew then, that the prosecutor was doing everything to discourage my counsel, which she succeeded, in pursuing the critical issue of unbilled hours. Furthermore, I concluded that such a decision on her part to suppress materials which she knew from previous discussions with attorney Gary Hansen, that these would constitute one of the main lines

of our defense. Finally, I did not know of any means I could use to get the suppressed documents where the proof of my innocence and lack of any criminal intent lied. Surprisingly as it may appear, Nguyen and myself, without the attorneys, were the only persons who continued to advocate for the need of the missing information.

4. Two days before the set date of trial (November 28, 1990), late morning, Short informed me that the government had approached him and proposed a plea bargain. I did not know that such a thing could happen in the legal system. I found the idea very disturbing, and was extremely angry. I instructed Short to forget about it and to proceed in the preparation of the trial. I clearly stated to Short that I could not plead guilty to anything that I am not guilty of. Deep in my mind, I viewed what Short told me to be a real chantage [sic]. It was scary because it was happening with the government. I did not want to think about it. I later talked to Nguyen about it, and he said that it was Peterson's advice to him to plead guilty. I still found the whole thing irrational, and did not want to change my position. It occurred to me that my decision should not be linked to that of Nguyen. I, therefore, instructed Short to inform the prosecutor that it was my intention to go to trial, independently of Nguyen's position. Short said to me that he would relate the message, but we needed to make a decision as soon as possible. I knew that any uncertainty in my position would only add an unnecessary burden on him during the remaining time left for his preparation work. I also asked Nguyen if he would be willing to be my witness if I went to trial. In doing so, I would be able to show the jury about the importance of the suppressed documents, and would

exert pressure on the government and shed more doubts on their motives and intentions before the jury. Furthermore, if Nguyen accepted in advance to be a witness for me, I would have provided more support and confidence to my counsel because, suddenly, the full burden of defense in this case would have fallen on him if Nguyen decided to plead guilty. Nguyen informed me he would do so if he was forced to plead guilty.

I made some contacts with friends of mine, and relatives of Nguyen, to inquire about their opinion whether I should plead guilty or not. As they were completely unfamiliar with my case, they honestly told me that they would think my attorney would know better than them. There was no pressure on their part for me to plead guilty, though it would be in their benefit to advise me in such a way that will create a favorable situation to Nguyen. I turned back to my counsel, and again insisted on going to trial. During this entire day, Short made no progress in the preparation for the trial. On one hand, he was waiting for the prosecutor's response, and somehow, was waiting for me to say to him that I agreed to plead guilty. I did not do so. Nevertheless, late in the afternoon, he informed me that the U.S. attorney was unwilling to let me go to trial if Nguyen decided to plead guilty. I found this matter very disturbing, and it appeared to me that Short was not doing anything or else, he could not do anything for reasons unknown to me. This was a fantastic move on the part of the government, and I concluded that the prosecutor was passing a message to me through Short. I immediately realized that I am not worth much to the government in this case, and that Nguyen was the person who was their target. It was clear

to me that, Nguyen's involved with the DOE in Richland, and his critical stance, in private or public, are the only reasons the government spent so much of their resources on the case. As such, my criminal case was clearly tainted. The inability or reluctance of Short (as well as Nguyen's counsel) to persuade the government of my wish to go to trial was clearly an indication of the government threat. On the other hand, Short avoided explicitly encouraging me to plead guilty during the first day, but the lack of focus in his trial preparation efforts was a clear indication of the de facto pressure he was putting on me. Nevertheless, Peterson became aware that the government refused to let me go to trial, and that his only advice to his client was being jeopardized by my decision to go to trial.

5. Prior to leaving Short's office, on November 28 before the guilty plea was entered, Short made a remark to me: **"Never fight the government"**. He also made this statement after I pled guilty. I was shocked the first time I heard such a remark, because of his misconception and misinterpretation of my professional achievements at EWA. As a matter of fact, I always viewed that my involvement in the EWA projects for YIN helpful to the government in many aspects, and more so, important in the preservation of the human principles and rights that are cherished in our american system. In Short's remark, I was many implications which I could not share with him at the time. First, it was not a good thing to fight the system. Being from a different background that most people indicted in the United States, I understood perfectly this point because I came from the country of Lebanon where the people have fought against each other

resulting in their self-destruction. The second implication of Short's statement is the fact the trust of the system would certainly be lost if I won the case against the government. This is only obvious because I have to face the same people who I fought in this criminal case. Again, I wondered if I have to become gypsy-citizen going from one country to the other, without being able to find another refuge where I can settle and have my personal and professional life flourish to benefit the society. In retrospect, I believe I was wrong in giving significant weight to my counsel's statement, particularly when I knew I was innocent. The fact I continued to claim my innocence to the Courts should be a mere reflection that I have not lost the trust in the system prior to becoming a citizen of the United States. In the absence of any family binding in the U.S. and that this country has turned its back against me, it seems even simpler for me to drop all my attachments. Instead, I stood fast. I have not reversed my opinion towards the American system, particularly when my decision to become a citizen was made voluntarily. To make such a committment [sic] in my life took several years since it was necessary to make sure that my mind had been purged from any external pressure. As I continue to believe in my innocence, I maintain a strong faith in the principles of America. I made such a statement in the front of the U.S. Parole Commission during my incarceration, heard their prejudice and racist replies to me, and frankly admit that my belief has remained firm and unchanged, and even strengthened.

6. On November 29, the morning of the day before the set date of trial, I went back to Short's office. My instructions to him were still unchanged. I kept asking him how

did he felt about my chances of being acquitted. His estimation started changing. A few days before, it was forty percent, and the last I heard was fifteen to twenty percent. I knew that he had already reduced his trial preparation effort, but was not willing to admit it openly. I also knew that he was being discouraged because I gave a hard problem which admitted the following only solutions: convince the government to take me to trial, or else coerce me to plead guilty. Not being able to convince the government to change its mind, he was left with the remaining solution of coercion. As a criminal lawyer, I believe that the only alternative he was left with was illegal, unfair, and more so unjust: He became reluctant, confused, and uncertain. The relief he got came from Nguyen's counsel who had strong interest in having me plead guilty. I called Nguyen to ask him about his decision. Nguyen told me that the only advice of Peterson was to plead guilty. I asked him if this would be the best thing to do for him in light of his personal family circumstances and the political persecution he was facing. I guessed I knew the answer already, and did not elaborate any further. So I asked Nguyen what were, in Peterson's opinion, the chances of being acquitted. I recall Nguyen having been given a low percentage that did not exceed five percent. This was astonishing to me because there was certainly two distinct unreconcilable versions provided to us by Short and Peterson. I talked to Short, and he suggested that we have a conference call with Peterson, I asked that I call Nguyen so that his counsel and him can get to us. At the same time, Short briefed Peterson about his progress. Within the next hour, a conference call between Nguyen and his attorney, and Short and

myself. I asked Peterson why did he suddenly loose confidence in trying the case. His answer was evasive. He made statements that the government was clearly unwilling to separate Nguyen from me, and that our chances are very low. Furthermore, Peterson stated that I may wish to consider the matter of pleading very seriously and that my decision will affect Nguyen. There was no effort on his part to talk to the prosecutor and convince them to separate the Nguyen case from mine **(WHICH I FIND IT NECESSARY IF HE EXPECTED ME TO PLEAD GUILTY SHOULD HIS EFFORTS TO SEPARATE OUR CASE FAIL).** I asked Peterson if pleading guilty was his only recommendation to us. He replied affirmatively. There was also a discussion that the implications of pleading guilty would not be severe, and that there may be no jail term at all. Finally, it was also stated that the Court, the prosecutor, and the agents will be very appreciative of our decision since they could go Christmas shopping. *It is interesting to note that the entire discussion did not cover the fact that we were both innocent, which they both admitted in private and publicly, and that we could not plead guilty for something that we were not guilty of.* Because my attorney did not interfere in the discussion, I concluded that he was in agreement with Peterson. Thus, instead of him coercing, he let Peterson give me the impression that Nguyen was going to plead guilty, which assumed that I had to plead guilty given the government's position. *Short did not interfere and did not make it clear that my interests were different than Nguyen under the circumstances. He did not even ask Peterson to try to convince the government to let me go to trial.* And thus, I felt completely isolated with nobody to turn to. Later, Nguyen

told me that Peterson said that he will give him credit for the amount Nguyen initially agreed to pay. I immediately recognized that this tactic was another bait for me. Nevertheless, I asked Short if he would do the same. He was surprised to find out that Peterson did that to Nguyen. He said that he would talk to Peterson and his partner William Mauzy. Early that afternoon, Short informed me that he would give me a refund of $20,000 on the $100,000 already paid to him. I thanked him, but was very specific that this amount would not have no influence on my decision to plead guilty. I was very specific then, that we should go over the elements of our defense in preparation of the trial. At that time, I realized he had lost ground over the past two days and that he was not yet ready for trial. I was counting on him reviewing the documents in Peterson's office during the last two days, but evidently he was unable to do it. Furthermore, there were a number of issues related to the EWA unbilled time and computer codes, among others, that could not be supported because the government was still suppressing the information. During our conference, I recall there were few interruptions by the prosecutor to find out where we were at or to threaten me that there was another civil lawsuit that the government was ready to file the next day. I even was told that the complaint would amount to a few millions. Even though I was very disturbed, worried, and scared, my instructions to Short were to continue planning for the trial. There was no other instruction from me to Short at that time. Then Peterson called Short. I was not privy to the conversation, but all I heard was Short' statement: "But my client is a P.E.". I was very upset, and felt substantial pressure on

me. The lack of Short's preparedness and the outside pressures on one hand, combined with the suppression of documents crucial to my defense, all suddenly made me loose confidence in the outcome of the trial. I finally forced myself to gather my mental forces looking for an alternative to untaint my case and to ask one final time that the government let me go to trial. I was exhausted, mentally coerced by many things and decided that I could not come up with anything new. I also realized that I was the only person defending myself. Short was observing me to see the outcome of his slow, but lethal doses on me. I finally decided to plead guilty with the expectation of withdrawing my guilt plea and returning to trial once the suppressed materials were returned. *Short never told me that I could not withdraw my guilty plea. (The Judge did not either).* As a matter of fact, Short clearly stated to me that every thing can be done with the adequate financial resources, which I did not have but though would be able to obtain some day. As such, I succombed [sic] to Short's pressures, and his final remark that I had to make a decision so that the Judge could be informed. It was past 4:00 PM when I informed Short that I was ready to plead guilty. I added that, this way, everybody would be happy, including the judge. I reiterated that I did not know what to plead guilty for, and my decision did not alter the fact I was innocent. He was relieved. He did not want to elaborate on any of my questions, but I recall he said not to worry. He added that I would be charged with only two counts, compared to the twenty five counts in the indictment. I then expressed to him that I did not wish to go that far. Only one count should do. He then called the prosecutor, but was not

able to convince her of my request. It seemed that this matter had already been brought up between Peterson in his already started negotiations. I felt somehow cheated by both Peterson and the prosecutor since their actions meant that I would plead guilty. In any case, I understood that the U.S. Attorney's office insisted on having two counts for statistical purposes, as this would relate to the federal funds the office would get allocated in the subsequent year. Short explained to me afterwards that there would not be any difference between one or two counts. In any case, I suddenly realized that I had to become more guilty on the records just to help improve the statistics of the Department of Justice. Again, one thing lead to another! Peterson was then contacted, and it seemed to me that he just learned of my decision from the prosecutor. There was a brief discussion on the counts which Nguyen and myself would plead guilty to. The process of pick and choose was certainly very peculiar and unreal to me.

I left Short's office not knowing what I would plead guilty for. There was no plea agreement at that time, no understanding on my part of what my offenses were, let alone the laws I violated. MOST IMPORTANTLY, THERE WAS NEVER AN EXPLANATION PROVIDED TO ME ABOUT THE CONSEQENCES [sic] OF THE PLEA, INCLUDING THE LOSS OF ALL MY CONSTITUTIONAL RIGHTS AND THE INABILITY TO WITHDRAW MY GUILTY PLEA. As can be seen in Appendix I, the plea agreement was faxed to Short at 5:40 PM. Even the prosecutor did not have the chance to make the corrections needed (see excerpts of Guilty Plea transcript, pages 5 and 6 provided in Appendix I):

> "Unfortunately, Your Honor, I realize that we will have to do that for each of the defendants. I apologize for that. I tried to make all the corrections this morning."

Recently, I also discovered from the boxes of documents that were kept with Short during the period of my incarceration, that the prosecutor faxed him a number of documents with the purpose of inducing me to plead guilty at the time when my request to counsel were clearly to prepare for my trial. I have not seen these faxes before, nor would I understand why the prosecutor would send something to Short unless they were engaging in discussions regarding a guilty plea when he was not authorized to enter into such discussions. In retrospect, I understand now why Short was having difficulties in the assimilation of my discussions during our last attempts to prepare for the trial. More seriously, SHORT HAD ENGAGED IN THE PLEA NEGOTIATIONS WITHOUT INFORMING ME HE WAS DOING SO, AND PRIOR TO MY DECISION TO PLEAD GUILTY. BY HIM GIVING THE IMPRESSION THAT I WAS TOTALLY UNDER HIS CONTROL, BUT THAT HE WANTED MY DECISION TO "MATURE" UNDER HIS SLOW COERCIVE TECHNIQUES. In retrospect, I now understand why he felt comfortable that I left before I saw the plea agreement and changed my mind. He asked me to meet with him the next morning, the day of the guilty plea, to prepare me and go over what I needed to say to take the maximum advantage of the plea. I was also surprised how quickly Short changed his mind about my innocence, and how he proceeded to select an offense for me with the full knowledege [sic] of

my innocense. This whole process was disgusting to me, but I was fed up by then.

7. On November 30, 1990, I went to Short's office at 7:00 AM. We were supposed to go over the plea. He showed me a draft of the plea. I read it but did not really understand what was the real offenses. He explained to me that it was basically related to a false COE invoice and to some other wrongdoings. I wanted to know about the consequences of my plea. He said that ther [sic] may be little or no jail term, and reiterated that the judge would be very appreciative of our decision. He also represented to me that I would be assigned a probation officer who would play an important role in sentencing. He then showed me his master sheet indicating a series of wrongdoings (Appendix I), which frankly amazed me. He also promised me that a number of overt acts would not be part of the plea agreement and the charges, contrary to what Defendant discovered a few minutes before he entered his plea (see handwritten one-page "coaching" note of counsel which clearly shows a number of overt acts that I categorically refused to be included for the purpose of the plea guilty). I was certain that he knew that my confessions were untrue, false and did not reflect any reality. Not only so, I was certain that he was aware of the concrete and solid evidence which would have proved my total innocence should the case have gone to trial. I argued with him, but he argued that those overt acts have no real dollar value. I realized that he was forcing me to commit perjury in open Court. I resisted, but succumbed to his pressures when he said to me that this would be the only way I could take advantage of the

benefit of the plea. I reminded him that it was my intention to go to trial, and I would be willing to go to trial if the judge pushed me to admit more than what Short told me to say. He agreed. He kept reminding me thereafter, that I should be contrite in front of the Court and to the probation officer in order not to anger them and inflict on myself an unnecessary complication. I found these warnings quite strange, particularly when I knew I was innocent and had to "play the game" that our counsels and the prosecutor forced me to play. After we finished the practice, we headed to Court.

It was a surprise to me, once we got to Court, that I had to sign accepting another count. This whole thing was getting very confusing. I looked at Nguyen, and saw him signing after his counsel told him to do so. I then asked Short if I should sign, He answered affirmatively. I then told him that I refused to sign because this new count suddenly had charged with an overt act related to my country of origin, which I had been vigorously refuting during the preparation of my trial and which Short kept telling me that he felt very confident in defending me on this point. Short told me then that, even if it was there, it did not mean I was guilty of it. I also noticed that the plea agreement did not include at the end, a statement saying that I understood . . . and agreed . . . , which made me more comfortable because I have honestly had some difficulty in understanding all the intricacies and reasoning of the entire process I was going through. It seemed to me that everything had been rushed in my case, starting with my decision to plead guilty, my review of the plea agreement, my signing of the information count, and even the

mistakes in the wording of the plea agreement as admitted by the prosecutor in open Court (see Appendix I).

During my appearance, I tried to say the minimum, but then had to make certain confessions out of nervousnes [sic] and in fear of the Court and its unknowns. After my appearance before the Court, I realized that my confessions were not truthful. It was then I became very emotionally disturbed. I FRANKLY ADMIT THAT I FELT NO REMORSE OR REGRET OF ANY NATURE BECAUSE I KNEW I WAS INNOCENT. *MY ONLY REGRET WAS THAT I COULD NOT OVERCOME THE EXTERNAL PRESSURE TO PLEAD GUILTY, DESPITE ALL MY RESISTANCE. I WAS FORCED TO COMMIT PERJURY.* I FELT BETRAYED BY MY COUNSEL, BUT DID NOT SAY SO BECAUSE I WAS STILL AT HIS MERCY. NEVERTHELESS, I KNEW THAT I WOULD BE WITHDRAWING MY PLEA SOON AFTER THE SUPPRESSED INFORMATION WHICH I NEEDED FOR AN ADEQUATE DEFENSE WOULD BE ENTIRELY RETURNED TO ME. I BELIEVED THAT JUSTICE IN MY CASE WOULD BE A MATTER OF TIME, AND I HAD TO BE PATIENT.

8. At the Probation Officer's request, I was to provide my version of the offense. This matter was practically impossible for me to do because I was innocent and I could no longer pretend that I was guilty. So I turned to Short and told him about my problem. He had no difficulty whatsoever in providing me with "something" to give to the Probation Officer (see fax sent by Short regarding the "Defendant's version to Probabtion [sic] Officer – Appendix I). I submitted to the Probation Officer, Mr. Dale Carlton, what Short gave to me. Mr. Carlton

did not ask me any questions, and I was very grateful to him.

9. After my guilt plea was entered, there were a few occasions where I called Short and complained to him about what happened. I also asked him if we should get out documents back from the government so that we could conduct an independent audit, and demonstrate to the judge that we were innocent. He never seemed to be enthusiast [sic] about the matter. He was busy and would rarely return the calls. However, I met with him a few times and he seemed to attribute my concerns to being psychological in nature rather than fact based. I knew then, that he was trying to get rid of me, and was not willing to do anything because the work in his opinion was not justified for the purpose of this criminal case. So I discussed the matter with Nguyen, and I suggested that, because I was more familiar with and knowledgeable [sic] of the company day to day business, I suggested to Nguyen if I could work closely with Peterson on the preparation of our proofs of innocence to the judge. He did not object. I the asked Short if it was okay to do so. He said it was agreeable to him. And so I worked closely with Peterson and the Public Accounting firm of Boyum and Barenschee, and SBA contractor, who conducted an independent audit of the EWA projects for YIN.

10. As I started to work with Peterson, I informed him that we needed EWA billing records to be able to proceed with the audit. I also talked to Nguyen about the matter who, after discussion with his counsel, asked me to prepare a concise list of what we would need for the audit. After going through the information we obtained during discovery, I came up with a list of monthly billing review

reports. The billing information (which was Brady material) was never willingfully [sic] provided to us by the prosecutor prior to the discovery; even we requested it, it was substantially missing. I also talked to Boyum & Barenscheer and included the additional items they needed for the purpose of their audit. Peterson became in charge of the communication with the government regarding the requested documents.

11. It took more than a month to obtain a response from the government. The prosecutor was very concerned about me going to the Federal Building and identifying the requested information. As a matter of fact, when I found out that the documents we requested were not there, the prosecutor started being evasive (e.g., changing subject and talking about accounting classes she took in school) and disturbed. The prosecutor then stated that the materials had been returned to EWA. I indicated that the materials requested were among the items seized, but not on the list of items returned. The prosecutor said she would check into the matter and get back to Peterson. As expected, her letter clearly admitted that the documents were not in the government possession. The only conclusion left was that they were destroyed, since the returned list (as prepared by the government) did not indicate the materials were returned. Peterson became aware of this serious problem. I told Short about it too. No action was taken, as it now seems to me that for them to have gone so far in forcing both Nguyen and myself to plead guilty, it would be a total sham if they raised the issue back to the Court. Furthermore, it seems that the counsels sacrificed our innocence at the expense of their personal pecuniary benefit.

12. During my two meetings with Mr. Carlton, I was emotionally disturbed. I should admit I felt bad about all the possible wrongdoings by Viet Ngo, EWA former President. Frankly, Ngo never reported to me what he was doing. It was always my impression that whatever he did was always legal, since he always represented to Nguyen and I that we should rely on him on all administrative, management, and marketing matters in the company. Nguyen and I did not know much about these duties, and it was clear to me that Ngo was the person in charge in those areas. Nevertheless, I should admit that EWA was my bread and butter. It was with me in the good times, and I had to be with the company at the bad times. It was a fiduciary type of attachment I had towards EWA, and I thus felt bad in regard to how things went without my control, or knowledge, or intention. I was defenseless and sad. I felt bad and regretful, and did not try to hide this feeling in front the Probation Officer. I was not "contrite" the way Short wanted me to be. I was trying to be as honest as possible with the Probation Officer. He never asked me any questions, which I was a great relief for me since he would have found out that I made false confessions in Court. I hoped he would find out about the truth as he proceeded with his investigation. All I know is that, after sentencing I called the Probation Officer to thank him for what he did to me. He said he tried to do his best. He was truthful, but was under pressure by the government and the DOE to not separate my case from Nguyen's [He made a remark to Peterson stating that he did not understand why the DOE hated Nguyen so much]. Finally, I would like to note that my expression of regret to Mr. Carlton was not artificial. HOWEVER, THEY

WERE NEVER MEANT TO BE AN ADMISSION OF GUILT. IN MY CULTURAL BACKGROUND, A STATEMENT OF

* * *

Kevin J. Short
Attorney at Law
Certified Criminal Trial Specialist

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Telephone (612) 333-9006 Facsimile (612) 333-5015

May 8, 1992

Dr. Georges V. Abi-Ghanem
400 Natchez Ave So
Minneapolis, MN 55416

Dear Dr. Abi-Ghanem:

I am in receipt of your April 30, 1992 letter. Your letter contains several inaccuracies which I would like to address.

On May 29, 1990 you retained the law firm of Mauzy & Short, P.A. to assist you in a federal criminal investigation that you were the target of. Your first contact was with me. During our first meeting, I explained to you that either Bill Mauzy or I would try your case in the event that you were indicted. I told you that we could not be sure as to the availability of either Bill or myself, but that one of us would handle the case for you. From that point on, I was your main contact in the law firm. You were never told that Bill Mauzy would try the case. As soon as you were indicted, it was made perfectly clear to you that I was going to be your trial lawyer (see the attached October 1, 1990 fee agreement).

Paragraph two of your letter indicates that your "experts and local authorities" have informed you that the amount of the fee you paid to Mauzy & Short, P.A. was excessive for the services you received. I would be very curious to know who your "local authorities and experts" are. Further, I would like to know whether or not you showed them the three retainer agreements in this case. I doubt very much that you informed them of the magnitude of the fraud case that was brought against you and Dr. Nguyen. As you recall, I spent hundreds of hours preparing your case for trial. You did not reach your decision to plead guilty until the evening before the day set for trial. Up until that evening, you had been telling me for six months that you were completely innocent of any wrongdoing and that I must diligently prepare the case for trial. I followed your instructions.

As you can see from reading the enclosed fee agreements, (I am unable to locate an executed copy of the May 29, 1990 agreement), you specifically agreed that the fees paid to Mauzy & Short, P.A. would be non-refundable. I meticulously explained to you the reasons for this, including the expertise of the law firm, the

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-90-118

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	PLEA AGREEMENT
v.	)	
GEORGES VICTOR ABI-GHANEM,	)	
Defendant.	)	

The United States represented by its attorneys Jerome G. Arnold, United States Attorney for the District of Minnesota and Jeanne J. Graham, Assistant United States Attorney, on the one hand, and defendant Georges Victor Abi-Ghanem, represented by Kevin Short, Esq. on the other hand, do hereby agree to resolve this case prior to trial on the following terms:

BACKGROUND

EWA, Inc. is a Minnesota Corporation providing engineering consulting services. Defendant Vietchau Nguyen is President of EWA and Defendant Georges Abi-Ghanem is Vice President. From October of 1984 through October of 1987, defendants engaged in conduct for the purpose of deceiving certain federal agencies to enter contracts and as to the work performed under those contracts. The agencies involved were the Department of

Energy (DOE), Army Corp of Engineers (COE) and the Small Business Administration (SBA).

To execute the scheme against the COE, defendants caused checks to be mailed via the United States Postal Service. Additionally, defendants committed overt acts as listed in the amended indictment for the purpose of furthering their plan to defraud the DOE, COE and SBA.

AGREEMENT

1) Defendant agrees to plead guilty to count 9 of the indictment charging defendant with mail fraud and a one-count information charging defendant with conspiracy to defraud the government.

2) Defendant understands that each offense carries a maximum sentence of five years in prison, a $250,000 fine or both, and up to five years probation.

3) The parties agree that the offense conduct occurred prior to November 1, 1987. Therefore, the Sentencing Reform Act of 1984 does not apply.

4) The United States will dismiss the remaining counts of the indictment at the time of sentencing.

5) The parties agree that restitution will not be included as a term of the sentence in this criminal matter. However, nothing in this plea agreement will prevent the recovery or attempted recovery of restitution or penalties through appropriate civil proceedings.

6) Defendant understands that the government may seek the imposition of costs for the prosecution of defendant, subject to defendant's ability to pay any costs.

7) There is no agreement as to the imposition of a fine, if any.

Dated:

Respectfully submitted,

JEROME G. ARNOLD
United States Attorney

BY: JEANNE J. GRAHAM
Assistant United States Attorney
Attorney ID No. 167368

Dated: _____

Kevin Short, Esq.
Attorney for Defendant

Dated: _____

GEORGES VICTOR ABI-GHANEM
Defendant

NOTES OF DR. ABI-GHANEM'S ATTORNEY

COE

Aware of Content before negotiation with Corps illegible

✓ (1) Experience of Employees

✓ (2) Number of Employees

✓? (3) Phantom Employees not seen

✓ (4) Viet Ngo's hours – Could have Removed

YIN

✓ (1) Viet Ngo's hours
Could have removed

✓ (2) 86 Defense Waste hours billed

(3) 85-86 Aware

No CH_2 M Hill

No Jungroth – 25%

✓ (4) 86-87 QA Outside Scope

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

U.S. Const. amend. v

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. P. 11

Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any

specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole of supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance

of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or

to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas: or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

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28 U.S.C. § 2255

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

8th Cir. R. 47B

Affirmance or Enforcement Without Opinion

A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:

> **(1)** a judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> **(2)** the evidence in support of a jury verdict is not insufficient;
>
> **(3)** the order of an administrative agency is supported by substantial evidence on the record as a whole; or
>
> **(4)** no error of law appears.

The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. *See* 8th Cir.R. 47B"; or "ENFORCED. *See* 8th Cir.R. 47B."

Supreme Court, U.S.
FILED
JUN 7 1994
OFFICE OF THE CLERK

No. 93-1401

In the Supreme Court of the United States

OCTOBER TERM, 1993

GEORGES V. ABI-GHANEM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court should have granted petitioner's motion under 28 U.S.C. 2255 to vacate his earlier guilty plea, on the ground that the parties failed to disclose to the court during the plea proceedings that the government's acceptance of plea agreements from petitioner and his co-defendant was conditioned on both defendants' agreement to plead guilty.

2. Whether the court of appeals erred in affirming the denial of petitioner's motion without rendering a written opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1401

GEORGES V. ABI-GHANEM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported, but the judgment is noted at 9 F.3d 114 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied on December 6, 1993. Pet. App. 13. The petition for a writ of certiorari was filed on March 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the District of Minnesota, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiring to defraud the government, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment. Pet. App. 68-73. Petitioner did not appeal his conviction or sentence. Petitioner did write a letter to the district court requesting a reduction in his sentence, which the court treated as a motion under Fed. R. Crim. P. 35. The district court denied that motion (Pet. App. 74-75), and the court of appeals affirmed (see *id.* at 4 n.1).

Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate his conviction and withdraw his guilty plea. Pet. App. 76-85. The district court denied that motion (*id.* at 3-12), and the court of appeals affirmed (*id.* at 1-2).

1. Petitioner was an owner and the vice president of EWA, Inc., a private engineering consulting firm that specialized in toxic waste studies. In May 1984, the Yakima Indian Nation hired EWA to do the engineering consulting work on a grant from the United States Department of Energy (DOE) to study the effects on the Yakima Reservation of a proposed nuclear waste site nearby in Hanford, Washington. The Yakima Nation renewed its contract with EWA annually from 1984 through December 1987, when DOE notified the Yakima Nation that a site in Nevada had been chosen for the nuclear waste. DOE continued its support to enable the Yakima Nation to review DOE's plans to restore the Hanford site to its original state. The Yakima Nation again hired EWA for that project, which extended the contract to 1989. Gov't C.A. Br. 3-4; see also Pet. App. 14-36 (indictment).

EWA's contract with the Yakima Nation was based upon time and materials expended, up to the contract ceiling. Each month, EWA submitted invoices for the work performed on the DOE contract to the Yakima Nation, which then transferred DOE funds to EWA. The Yakima Nation's contracts with EWA from 1984 through 1989 resulted in a total payment to EWA of approximately $4.7 million in DOE grant funds. Of that total, government auditors determined that approximately $465,000 represented fraudulent billings by EWA. The government alleged that beginning in 1984, EWA falsely billed the Yakima Nation—and thus DOE—by charging the Yakima Nation for work hours that involved other EWA contracts, including other government agency contracts and one private contract, and by misrepresenting its employees' rates of pay. The indictment charged that petitioner participated in the false billing scheme by, among other things, overstating the hours he spent working on the Yakima Nation contract, causing other employees to do the same, and charging to that contract hours spent on projects outside its scope. See Gov't C.A. Br. 3-5; Pet. App. 14-18 (indictment); Pet. App. 50-53 (recitation of terms of supplemental criminal information).

The government further charged that petitioner and his co-defendants, EWA and its president, Vietchau Van Nguyen, executed a similar scheme in connection with two EWA contracts with the Army Corps of Engineers. In 1986, EWA contracted with the Corps to conduct hydrology studies. In 1988, EWA obtained a similar contract from the Corps through the Small Business Administration's (SBA) minority and disadvantaged business concerns program. On both contracts, the government alleged that EWA falsely represented to the Corps and to SBA the qualifications and pay rates for

EWA employees, thus inflating the Corps' bills. Gov't C.A. Br. 5; Pet. App. 14-18 (indictment); Pet. App. 50-53 (terms of supplemental information).

2. The grand jury returned a 25-count indictment charging petitioner, EWA, and Nguyen with various criminal offenses in connection with the Yakima Nation and Corps of Engineers contracts. Pet. App. 14-36. On November 30, 1990, pursuant to a plea agreement, petitioner pleaded guilty to one count of mail fraud in connection with the Corps contract, as charged in the indictment, and to one count of conspiring to defraud the government with respect to both the Yakima Nation and Corps contracts, as charged in a supplemental criminal information filed with the plea agreement.[1] *Id.* at 37-67. Petitioner's plea agreement provided that the offense conduct occurred before November 1, 1987 (and thus that the Sentencing Reform Act of 1984 would not apply, see 18 U.S.C. 3551 note); that each offense carried a maximum sentence of five years in prison, a $250,000 fine, or both, and up to five years' probation; that the government would not seek restitution as part of petitioner's criminal sentence, but would remain free to pursue civil recovery proceedings; and that the other 24 counts of the indictment would be dismissed. Pet. App. 37-39.

During the hearing held under Fed. R. Crim. P. 11 in connection with the acceptance of petitioner's pleas, the district court questioned petitioner at length about his understanding of the rights he was surrendering by pleading guilty, the possible sentence he faced, the charges to which he was pleading guilty, the factual

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[1] Petitioner waived his right to indictment on those charges as part of the plea proceedings. Pet. App. 47-50; see Fed. R. Crim. P. 7(b).

basis for those charges, and the terms of the plea agreement. Pet. App. 40-67. Petitioner stated that he had discussed the plea agreement with his attorney and understood and agreed with its terms. See, *e.g.*, *id.* at 41-42, 46, 58, 65-66. In response to the court's questioning, petitioner denied that he had been subjected to any force or threats in connection with his pleas, or had been offered any promises other than those contained in the plea agreement. *Id.* at 57-58. Finally, the court asked, "Are you here then this morning to plead guilty because after thinking it over, and talking to your lawyer, and considering it very carefully, it seems to you to be the best course for you to follow at this stage?" Petitioner responded, "Yes, Your Honor." *Id.* at 58.

During the plea colloquy, petitioner admitted his participation in the two counts to which he was pleading guilty. He stated that he "should not have allowed those [false] hours to be billed out to the Corps of Engineers," and acknowledged that he could have rectified the situation that resulted in the Corps' overpayment of fees to EWA. Pet. App. 61; see *id.* at 59-62. Similarly, petitioner admitted that some of the hours billed to the Yakima Nation on the DOE contract were "billed wrongfully" or "were not authorized," that certain work was not within the scope of the contract, and that he "failed to rectify the situation." *Id.* at 63-64; see *id.* at 62-65. Under specific questioning by his own lawyer and by the court, petitioner acknowledged that he performed the admitted acts "voluntarily and intentionally" as part of his "agreement [with co-defendant Nguyen] to defraud the United States Government, that is, [to] get some moneys that EWA was not entitled to through that course of conduct," and stated explicitly that he "knew the company would benefit from those mischarges to our clients." *Id.* at 64-65.

At the end of the plea proceeding, the court again specifically asked petitioner whether he had understood each of the questions asked of him, whether he had answered those questions truthfully, and whether he wished to have more time to consult with his lawyer. Pet. App. 65. The court then accepted petitioner's guilty pleas, stating that it was "clear" to the court that those pleas were "free and voluntary and knowing."[2] *Id.* at 66.

Petitioner did not appeal his conviction or sentence. Petitioner did write a letter to the district court, approximately four months after sentencing, requesting a reduction in his sentence. That letter did not raise any allegation of impropriety with respect to petitioner's guilty plea. See Pet. Supp. C.A. App. 1-6. The court treated the letter as a motion under Fed. R. Crim. P. 35, and denied the motion (Pet. App. 74-75). The court of appeals affirmed (see *id.* at 4 n.1).

3. Immediately before his release from federal custody in June, 1992 (see Pet. App. 4 n.1), petitioner filed the motion under 28 U.S.C. 2255 that is at issue here. Pet. App. 76-85. The district court denied the motion. *Id.*

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[2] At petitioner's sentencing hearing, which took place several months after acceptance of his pleas, petitioner's counsel argued that petitioner's criminal conduct was narrower than the government's overall case suggested, but emphasized that petitioner was not "backpaddling" from his guilty pleas. Sent. Tr. 5, 7-8. He stated specifically that "the overriding point that I think Doctor Abi-Ghanem wants me to make on his behalf is he regrets the mistakes that he made, and does not deny that those mistakes constitute criminal conduct" (*id.* at 5), and that "through the process of negotiating with [the prosecutor], we came to realize that even though many of the allegations were defensible, some of them simply were not" (*id.* at 7). Immediately thereafter the court asked petitioner whether he had anything further to say on his own behalf, and petitioner responded "No, Your Honor, I don't have anything except I regret that this has happened." *Id.* at 8.

at 3-12. The court rejected petitioner's contention that his guilty plea was involuntary because he was not informed of the elements of the charges against him. *Id.* at 4-5, 8. The court held that it was "satisfied that petitioner's guilty plea was voluntary." *Id.* at 5.

The court also rejected petitioner's contention that his guilty pleas should be vacated because the government had failed to disclose to the district court that it had conditioned its plea agreements with petitioner and Nguyen on the willingness of both defendants to enter into acceptable agreements, so that the government would not be required to proceed to trial against either defendant. Pet. App. 6. The court concluded that the government's decision not to enter into separate agreements was not improper, that "[p]etitioner had a choice of whether to plead guilty or go to trial and he chose to plead guilty," and that "[p]etitioner's predicament was the result of his own criminal misconduct, not prosecutorial misconduct." *Ibid.* The court similarly rejected a variety of other claims raised by petitioner's motion. *Id.* at 7-12.

The court of appeals affirmed. Its brief order recited that the court had carefully considered petitioner's contentions that his pleas were coerced, involuntary, and not supported by a factual basis, and had found them to be without merit. Pet. App. 1-2. In a petition for rehearing and suggestion for rehearing en banc, petitioner argued that, in denying without opinion his claim regarding the failure to disclose the government's position with respect to separate pleas, the appellate panel had violated Eighth Circuit Rule 47B, which provides for summary affirmance in certain cases. See Pet. App. 126. The court denied the petition without further comment. *Id.* at 13.

ARGUMENT

1. Petitioner contends (Pet. 11-12, 15-25) that his guilty pleas should be vacated because of the parties' failure to notify the district court that the government had conditioned its agreement not to proceed to trial against each defendant on the willingness of both defendants to enter into satisfactory plea agreements. Petitioner claims that that failure violated Fed. R. Crim. P. 11 and the Due Process Clause, and prevented the district court from making an adequate assessment of the voluntariness of petitioner's plea.

a. As a threshold matter, petitioner waived any such claim by failing to raise it in a direct appeal from his conviction, at his sentencing hearing (more than four months after the acceptance of his pleas), or in his letter to the court seeking a reduction of his sentence under Fed. R. Crim. P. 35. As petitioner acknowledges (Pet. 24), it was not until petitioner filed the present motion under 28 U.S.C. 2255, more than one year after pleading guilty, that he first raised any claim of impropriety with respect to his pleas. See *United States* v. *Frady*, 456 U.S. 152, 162-166 (1982); *United States* v. *Timmreck*, 441 U.S. 780 (1979). The government apparently failed to raise the issue of waiver before either the district court or the court of appeals in this proceeding. Compare *Godinez* v. *Moran*, 113 S. Ct. 2680, 2685 n.8 (1993) (State may waive benefit of non-retroactivity rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), in federal habeas corpus proceeding under 28 U.S.C. 2254). Petitioner's original default would nonetheless be a sufficient ground on which to affirm the judgment below in this case. See *Schiro* v. *Farley*, 114 S. Ct. 783, 788-789 (1994). The prospect of affirmance on that procedural ground,

regardless of the merits of petitioner's underlying claim, counsels against granting further review in this case.

b. In any event, petitioner's claim is without merit. The government may not induce a defendant to plead guilty "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), this Court noted that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused * * * might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." That concern applies to "package" plea agreements like the one at issue here on the ground that a defendant might be subject to pressure from his co-defendants to plead guilty so that they could obtain the benefits of the overall deal. See, *e.g.*, *United States* v. *Caro*, 997 F.2d 657, 658-659 (9th Cir. 1993).

Nonetheless, as petitioner acknowledges (Pet. 17-18), the courts of appeals have uniformly held that "package" pleas or other agreements conferring third-party benefits do not violate the Due Process Clause. See, *e.g.*, *United States* v. *Caro*, *supra*; *United States* v. *Clements*, 992 F.2d 417, 419 (2d Cir.), cert. denied, 114 S. Ct. 316 (1993); *United States* v. *Pollard*, 959 F.2d 1011, 1020-1021 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992); *United States* v. *Morrow*, 914 F.2d 608, 613 (4th Cir. 1990); *Politte* v. *United States*, 852 F.2d 924, 930-931 (7th Cir. 1988); *Mosier* v. *Murphy*, 790 F.2d 62, 66 (10th Cir.), cert. denied, 479 U.S. 988 (1986). The government's offer of lenient treatment to a third person or of a "package" plea agreement is simply one factor bearing on the question whether a defendant's plea is voluntary. *Clements*, 992 F.2d at 419. As the Second Circuit put it in *United States*

v. *Marquez*, 909 F.2d 738, 742 (2d Cir. 1990), cert. denied, 498 U.S. 1084 (1991), "[s]ince a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others."

The courts of appeals have adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is part of a package deal. Compare, *e.g.*, *Caro*, 997 F.2d at 659-660 (government "must alert" district court to fact that defendants are entering linked agreements), and *United States* v. *Daniels*, 821 F.2d 76, 79-80 (1st Cir. 1987) (Rule 11(e)(2) requires disclosure of all material details of plea agreements, including linkage with other agreements), with *Ciements*, 992 F.2d at 419 ("preferred practice" is to advise court explicitly of any condition on plea agreement), and *Morrow*, 914 F.2d at 613 (failure to inform court of linkage of pleas "may raise eyebrows"). Those procedural differences do not, however, lead to substantially different outcomes, and they do not require this Court's intervention to fashion a uniform rule. No court has held that the failure to notify the district court that a plea agreement is one part of a package is a per se reason to allow a defendant to withdraw his guilty plea. The courts have focused, instead, on whether a particular plea was, in fact, voluntary. See, *e.g.*, *Caro*, 997 F.2d at 660; *Daniels*, 821 F.2d at 79-80; *Marquez*, 909 F.2d at 742; see also Fed. R. Crim. P. 11(h) (harmless error rule for acceptance of pleas); *United States* v. *Allard*, 926 F.2d 1237, 1244 (1st Cir. 1991).

In *Caro*, for example, the Ninth Circuit vacated the district court's order denying the defendant's motion to set aside his guilty plea before sentencing. While the court required the government to inform the district

court that the plea agreement involved a "package deal," the court also held that any failure to do so is subject to harmless error analysis under Fed. R. Crim. P. 11(h). The court made clear that on any particular set of facts, "[w]hether the plea is voluntary and intelligent is the touchstone for determining whether substantial rights have been violated in the acceptance of a guilty plea." 997 F.2d at 660. On the facts of the case before it, the court held that the government's failure to alert the district court to the "package" plea, and that court's consequent failure to inquire into the possibility of untoward pressure from the appellant's co-defendants, "could well have affected [the appellant's] decision" to plead guilty. *Ibid.* The court of appeals therefore remanded the case to the trial court for a "more careful examination" of the voluntariness of the plea. *Ibid.*, quoting *United States* v. *Castello*, 724 F.2d 813, 815 (9th Cir.), cert. denied, 467 U.S. 1254 (1984).

Similarly, in *Daniels*, the First Circuit reversed the defendant's conviction because, in addition to the parties' failure to advise the court of the "package deal" plea agreement, specific aspects of the Rule 11 colloquy between the district court and the defendant "cast doubt on the voluntariness of [the] plea." 821 F.2d at 79. The court indicated, however, that failure to disclose that a particular plea was part of a "package deal" would, like any other procedural error under Rule 11, be disregarded if it did not affect the voluntariness of the plea. *Id.* at 80.

In this case, there is no substantial factual question that petitioner's plea was voluntary. In response to thorough and careful questioning by the court, the prosecutor, and his own counsel, petitioner repeatedly acknowledged at the plea hearing that he understood both the charges against him and the rights that he was waiving, that he had consulted with his attorney, that he

understood and accepted the plea agreement, and that there was a proper factual basis for the charges to which he pleaded guilty. See pages 4-6, *supra*; Pet. App. 40-67. Petitioner agreed with the court that he had decided to plead guilty "because after thinking it over, and talking to [his] lawyer, and considering it very carefully, it seem[ed to him] to be the best course for [him] to follow." *Id.* at 58. Such declarations carry a strong presumption of verity when made in open court by any defendant. *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977); *Morrow*, 914 F.2d at 614; *Politte*, 852 F.2d at 931. In this case, they were made by a highly educated (see Pet. 2), commercially sophisticated defendant, represented by experienced counsel, after six months of preparation for trial. See Pet. App. 113-114.[3] In sum, the record provides no basis for concluding that petitioner's guilty pleas resulted from anything other than a knowing and voluntary choice. Under those circumstances, petitioner's claim would not have prevailed under any circuit's approach to "package" pleas.

2. Petitioner contends (Pet. 12-14, 25-30) that the court of appeals erred in disposing of this case by a summary order affirming the district court's decision (see Pet. App. 1-2). To the extent that petitioner's argument rests on a purported violation by the appellate panel of the court of appeals' own rules (see Pet. i, 26),

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[3] Although the petition and appendices contain various factual allegations about petitioner's relationship with his attorney, petitioner gave no hint of any dissatisfaction with his representation either at the plea hearing (where he specifically assured the judge to the contrary, Pet. App. 46) or four months later at his sentencing. Both courts below in this proceeding rejected petitioner's claim of ineffective assistance (*id.* at 1-2, 4-5; see Pet. C.A. Br. 27-28), and petitioner has not renewed that claim in this Court. See Pet. i.

the issue is properly left in the hands of the court of appeals, and does not call for this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957); *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 260 & n.20 (1953).

To the extent that petitioner's argument rests on a broader proposition that the court below had a duty to issue a precedential opinion on the question whether the parties must specifically notify district courts of "package" plea arrangements, his claim lacks merit. Courts of appeals have substantial discretion in determining what issues require written opinions to give guidance to the lower courts within their jurisdictions, *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972), particularly with respect to matters of procedure. In light of the district court's treatment of the issues presented here (Pet. App. 4-6) and the essentially factual nature of the key question of voluntariness, there was no need for the court of appeals to write an opinion explaining its reasons for affirming the district court's disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1401

In The

Supreme Court of the United States

October Term, 1993

GEORGES V. ABI-GHANEM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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REPLY ARGUMENT

This petition raises an important question of federal criminal procedure, going to the heart of the guilty plea hearing. Because multi-defendant cases are growing in number and because the circuits are split about what information must be provided to district judges about package plea conditions of plea agreements, this Court should grant this petition and decide its merits.

The record in this case does not pose any obstacles to the grant of certiorari; rather the issue is squarely presented. Accordingly, this case presents the Court with an appropriate opportunity to resolve the conflict that has developed among the circuits concerning the acceptance of guilty pleas in multi-defendant cases.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE LEGALITY OF NONDISCLOSURE OF PACKAGE PLEA CONDITIONS IN PLEA AGREEMENTS AND TO ENSURE UNIFORM ADMINISTRATION OF FEDERAL CRIMINAL PROCEDURE

The government's response to the petition for certiorari confirms the importance of the question presented and the need for this Court's review. Under current law, the information a district judge is provided to assess the voluntariness of a guilty plea in a multi-defendant case varies with the circuit in which that judge sits. Indeed, as the government acknowledges, the circuits have "adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is a part of a package deal." *See* Brief For The United States In Opposition, at 10 (hereafter "Govt. Opp.")

That situation is intolerable; the assessment of voluntariness of guilty pleas under Rule 11 of the Federal Rules of Criminal Procedure and under the Due Process Clause must be uniform across the nation. This petition presents the appropriate occasion upon which to decide whether, prior to accepting a plea as "voluntary," "knowing," and "intelligently" made, a district judge must be informed of the existence of a package plea condition in a plea agreement so as to be able to assess the defendant's plea.

A. Dr. Abi-Ghanem's Petition Is Not Procedurally Barred

The government attempts to deflect attention from the serious issues squarely presented in the petition by asserting that the merits do not matter because a possible procedural bar "counsels against granting further review in this case." Govt. Opp. at 8-9. The government argues that because Dr. Abi-Ghanem did not, either at his sentencing or in a direct appeal, challenge the non-disclosure of the package plea condition, this Court should deny the petition for certiorari. Govt. Opp. at 8-9. At the same time, as the government acknowledges, it has never before raised this issue. Govt. Opp. at 8.

Thus, on certiorari, the government asks this Court to confront two issues of waiver, neither of which have been developed below. This Court should decline the government's invitation to use the certiorari process to explore or act on – without a record – waiver issues for two reasons. First, because the government should not be encouraged to make waiver arguments belatedly and second, had the argument been made in a timely fashion, lower courts would also have concluded that Dr. Abi-Ghanem's claim is not barred.

The government waived any procedural bar claim when it failed to raise it both before the district court and later the court of appeals. Govt. Opp. at 8-9; *see United States v. Metzger,* 3 F.3d 756, 757 (4th Cir. 1993) *cert. denied,* 94 WL 96099 (1994). While this Court has the discretion to excuse the government's waiver (*see Schiro v. Farley,* 114 S. Ct. 783, 788-89 (1994)), it would be inappropriate to do so here. To permit the government to raise the claim now would be to sanction the insertion of an argument at a time when Dr. Abi-Ghanem is under the handicap of not having had the opportunity to develop an appropriate record. Thus, this Court should conclude that the government is estopped from raising such issues at this point in the proceedings. *See United States v. Turner,* 898 F.2d 705, 711 (9th Cir.) *cert. denied,* 495 U.S. 962 (1990). To do otherwise would be to encourage "sandbagging," and enable the government to wait until the opportunity for development of the record has ended to raise issues. *See Wainwright v. Sykes,* 433 U.S. 72, 89, 97 S. Ct. 2497, 2508, 53 L.Ed.2d 594 (1977).

Second, and more importantly, had the government raised the claim in a timely fashion, the lower courts would have concluded that Dr. Abi-Ghanem could establish both cause and prejudice. According to the government, Dr. Abi-Ghanem should have challenged the non-disclosure of the package plea condition of his plea agreement at his sentencing or by filing a notice of appeal within ten days of his sentencing (Fed.R.App.P. 4(b)) and raise the issue in a direct appeal. Govt. Opp. at 8. In his *pro se* § 2255 motion filed before the district court, however, Dr. Abi-Ghanem alleged facts which established cause for his failure to challenge the non-disclosure of the package plea condition at either of those stages – he had been denied effective assistance of counsel by his attorney's failure to advise him properly about the package plea condition and by the attorney's improper pressure to have him go along with the plea agreement. *See* Petitioner's Appendix at 89, 96-108 (hereafter "Pet. App.") A lawyer's failure to provide constitutionally sufficient representation establishes cause for the failure to challenge the package plea on direct review. *See Murray v. Carrier,* 477 U.S. 478, 488-89, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986).

Dr. Abi-Ghanem's § 2255 motion and supporting papers also established that he suffered prejudice from the non-disclosure of the package plea condition. Dr. Abi-Ghanem mistakenly believed that the package plea condition meant that if his codefendant wanted to accept the government's plea offer, he was required to do so as well; he would not otherwise have pled guilty. Pet. App. at 101-107. Had the package plea condition been disclosed to the district court, the district court would have questioned Dr. Abi-Ghanem about the condition during the Rule 11 hearing and Dr. Abi-Ghanem's mistaken understanding of the condition would have been corrected.

This Court has also concluded that there are rare cases in which, even if cause and prejudice could not be established, procedural defects should be excused, so as to avoid a fundamental miscarriage of justice. *See Sawyer v. Whitely,* 505 U.S. ___, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). As is detailed in both his § 2255 motion and in his earlier letter to the district court that was treated as a Rule 35 motion to the district court, Dr. Abi-Ghanem has stated that he was actually innocent. Dr. Abi-Ghanem's detailed analysis of why he was factually innocent thus provides an entirely

separate basis for excusing any procedural default that might have occurred. Pet. App. at 91; *see Sawyer v. Whitely, supra; Smith v. Murray,* 477 U.S. 527, 538-39, 106 S. Ct. 2661, 91 L.Ed.2d 434 (1986).

Finally, given the late stage at which the government has raised the issue of a possible procedural default, rather than deny the petition outright on that basis this Court at a minimum should vacate the judgment and remand to the district court for a hearing on the issue of whether there was a procedural default and whether there are grounds to excuse any such default.

B. The Different Procedural Rules Of The Circuit Courts Cause Unacceptable Differences In Rule 11 Hearings And In The Treatment And Outcome Of Post-Plea Proceedings

While acknowledging that the circuit courts have "adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is part of a package deal," the government argues that this Court's review is not necessary because the different rules "do not . . . lead to substantially different outcomes." Govt. Opp. at 10. The government is incorrect in two respects.

First, there can be no dispute that the different rules call for different procedures at the time of the taking of the plea. The United States government is under different obligations, circuit by circuit, to inform courts of package plea conditions, and a defendant in one circuit will be differently advised from a defendant in another circuit. The information that federal judges are provided in Rule 11 hearings should not vary but should be uniform; this Court's decision on disclosure would ensure that district courts in the first instance follow the same procedure during the Rule 11 hearing when considering pleas.

Second, the different procedural rules among the circuits do result in different outcomes in post-plea challenges. When a defendant in the First Circuit or Ninth Circuit raises the failure to disclose a package plea condition before sentencing, he or she is likely to have the plea vacated since those Circuits have held that disclosure is required. *See United States v. Caro,* 997 F.2d 657, 659-60 (9th Cir. 1993); *United States v. Daniels,* 821 F.2d 76,

78-79 (1st Cir. 1987). A defendant in the Second Circuit who raises such a claim prior to sentencing will not have grounds to have the plea vacated, but may receive a hearing at which to establish the plea should be vacated, given the Second Circuit's stated position encouraging disclosure. *See United States v. Clements*, 992 F.2d 417, 419 (2d Cir.) *cert. denied*, ___ U.S. ___, 114 S. Ct. 316, 126 L.Ed.2d 262 (1993). A defendant in the Fourth Circuit, however, is likely to receive "raise[d] eyebrows," but not more. *See United States v. Morrow*, 914 F.2d 608, 613-614 (4th Cir. 1990).

Moreover, even assuming as the government contends that to obtain post-conviction relief based on the failure to disclose a package plea condition, a defendant will have to prove that the failure to disclose the condition made his or her plea involuntary (Govt. Opp. at 10), the response to such challenges will vary depending on whether the circuit in which the claim is raised requires disclosure, encourages disclosure, or does neither.

C. This Court Should Establish A Uniform Rule That A Package Plea Condition Must Be Disclosed To The District Court At The Rule 11 Hearing

The government agrees that a package plea condition of a government plea offer is a factor that bears upon the voluntariness of a defendant's guilty plea. *See* Govt. Opp. at 10-11. Since the purpose of the Rule 11 hearing is to allow the district court to determine accurately whether a defendant's plea is voluntary, knowing, and intelligent, a package plea condition should be disclosed to the district court before it accepts a defendant's guilty plea.[1] As Judge (now Chief Judge) Breyer explained in *United States v. Daniels*, 821 F.2d at 78-79, a package plea condition is so

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[1] Disclosure of a package plea condition is also important and should also be required not only to ensure that a guilty plea is voluntary, but also to ensure that it is knowing and intelligent. *See Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257, 49 L.Ed.2d 108 (1976). Dr. Abi-Ghanem, as demonstrated by his § 2255 pleadings, incorrectly understood that the package plea condition meant that if his codefendant wanted to accept the government's offer and plead guilty, he would be required to do so as well. Pet. App. at 101-107. As noted above, if the package plea condition had been disclosed to the district court, Dr. Abi-Ghanem would have been questioned about the condition during the Rule 11 hearing and this mistaken understanding would have been remedied.

material to a plea bargain that failure to disclose it prevents the district court from adequately assessing the voluntariness of a plea. This same view was expressed by the Ninth Circuit in an opinion written by Judge Kozinski. *See United States v. Caro*, 997 F.2d at 659-70. Moreover, the conclusion that disclosure should be required to ensure that a defendant's plea is voluntary and also knowing and intelligent is supported by the absence of any counter arguments that justify keeping such a material term of a plea agreement secret from the district court.

Nevertheless, the circuit courts have not agreed that disclosure is required or even that it should necessarily be encouraged. As is fully discussed in Dr. Abi-Ghanem's petition for a writ of certiorari (at 19-29), the First Circuit and Ninth Circuit have ruled that disclosure is mandatory, *United States v. Daniels*, 821 F.2d at 78-79; *United States v. Caro*, 997 F.2d at 659-70; *cf. United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 322, 121 L.Ed.2d 242 (1992), the Second Circuit has encouraged disclosure and indicated that it is the preferred practice but has not made it mandatory, *United States v. Clements*, 992 F.2d at 419, and the Fourth Circuit has ruled that disclosure is not required and does not encourage or recommend disclosure. *United States v. Morrow*, 914 F.2d at 613-14.

While Dr. Abi-Ghanem believes that the opinions authored by Chief Judge Breyer in *Daniels* and Judge Kozinski in *Caro* state the appropriate rule, the existence of a conflict among the circuits warrants review by this Court so that a uniform rule is followed in all district courts for all defendants, regardless of the circuit in which they are prosecuted.

D. The Failure To Disclose The Package Plea Condition In This Case Requires At A Minimum That Dr. Abi-Ghanem Be Given An Evidentiary Hearing At Which He Would Have The Opportunity To Establish That His Plea Was Involuntary

The government also attempts to discourage review in this case by arguing that "there is no substantial factual question that petitioner's plea was voluntary." Govt. Opp. at 11. Like its argument on procedural bar, the government here tries to turn this Court – at the certiorari stage – into a trier of fact. While the

government predicts the outcome of a hearing to which Dr. Abi-Ghanem should be entitled, that prediction is erroneous: to the extent they are relevant, the factors cited by the government support Dr. Abi-Ghanem's claim that his plea was involuntary.

The government first attempts to rely on the transcript of the plea colloquy to demonstrate the "voluntariness" of Dr. Abi-Ghanem's plea. Govt. Opp. at 11-12. The issue of voluntariness raised here however, turns on the package plea condition, which was not disclosed to the district court. Of course, the plea transcript does not discuss that which was not disclosed; no mention is made of the package plea condition, and that is the problem.[2]

Second, the government relies on the assertion that Dr. Abi-Ghanem is "highly educated [and] commercially sophisticated" to support the voluntariness of the plea. Gov't. Opp. at 12. A defendant's education does not make a plea voluntary, nor relieve the prosecution from disclosing material information to the district court. Moreover, while Dr. Abi-Ghanem is a highly qualified scientist, he has no substantial experience in matters of commerce and his training as an engineer does not make him "sophisticated" in federal criminal procedure for jointly tried defendants. In fact, the record demonstrates Dr. Abi-Ghanem's inexperience in this area; his affidavit in support of his § 2255 motion stated that he was completely unfamiliar with the practice of plea bargaining until two days before his trial was scheduled to begin. *See* Pet. App. at 96 ("I did not know that such a thing could happen in the legal system.")

The third factor cited by the government by which it attempts to prove voluntariness is that, it claims, Dr. Abi-Ghanem was represented by "experienced counsel." Govt. App. at 12. But, as Dr. Abi-Ghanem explained in his § 2255 motion, his lawyer provided constitutionally inadequate representation and allowed Dr. Abi-Ghanem to be subjected to the pressure of his co-defendant's

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[2] To the extent the existing plea colloquy might be seen as relevant to the issue of voluntariness raised here, the "strong presumption of verity" that statements during the colloquy ordinarily carry (Govt. Opp. at 12), is overcome in this case because Mr. Abi-Ghanem has written proof that his attorney coached him with a "crib sheet" as to how to answer the court's questions to insure the plea would be accepted. *See* Pet. App. at 118.

attorney. Pet. App. at 101. That lawyer, despite a serious conflict of interest, exerted improper pressure on Dr. Abi-Ghanem to accept the package plea offer. Pet. App. at 101. The fourth point raised by the government is that the plea was entered "after six months of preparation for trial." Govt. Opp. at 12. Once again, that fact does not illuminate the question of voluntariness. As Dr. Abi-Ghanem explained in his § 2255 motion, he had expected for six months to proceed to trial and not until two days before trial did his attorney discuss a plea with him. The package plea condition was first made known to him at that time. *See* Pet. App. at 97.

The relief Dr. Abi-Ghanem is entitled to, at a minimum, is a hearing before the district court on his claim that the failure to disclose the package plea condition to the district court resulted in his plea being neither voluntary, knowing or intelligent. While there is little point or relevance to speculating about the outcome of such a hearing at this time, the available evidence strongly suggests that Dr. Abi-Ghanem would prevail.

II. THIS COURT SHOULD GRANT REVIEW TO EXERCISE ITS SUPERVISORY POWERS TO ENSURE THAT THE INTERMEDIATE APPELLATE COURTS DO NOT AVOID THEIR OBLIGATION TO PROVIDE APPELLATE REVIEW AS REQUIRED BY LAW

In its attempt to justify the summary affirmance, the government asserts that it was appropriate for the court of appeals to issue a summary affirmance "[i]n light of the district court's treatment of the issues presented here." Gov't. Opp. at 13, citing Pet. App. at 4-6. As Dr. Abi-Ghanem explained in his briefs to the court of appeals and in his petition for a writ of certiorari to this Court, the district court actually completely misconstrued the claim in his § 2255 petition concerning the non-disclosure of the package plea condition. The district court construed this claim only as an allegation that a package plea condition was, *per se,* prosecutorial misconduct (Pet. App. at 6), even though Dr. Abi-Ghanem made no such an argument. Thus, contrary to the government's assertion, the court of appeals' summary affirmance of the denial of the petition, affirming as it did the district court's misconstrued ruling, illustrates the need for this Court to exercise its supervisory powers to

provide guidance on the much debated issue of unpublished opinions and summary affirmances. *See* Gilbert S. Merritt, "Judges on Judging," 51 *Ohio St. L. Journal* 1385 (1990); Daniel K. Hoffman, "Nonpublication of Federal Appellate Court Opinions," 6 *The Justice Journal* 405 (1981); William L. Reynolds & William M. Richman, "The Non-Precedential Precedent – Limited Publication and No Citation In the United States Courts of Appeals," 78 *Columbia L. Rev.* 1167 (1978).

Despite the government's assertions, Dr. Abi-Ghanem is not arguing that he has a private right of action under the internal rules of the appellate courts. *See* Gov't. Opp. at 12-13. What he asks is for this Court to exercise its supervisory authority, as it has done in the past, to ensure that litigants before a circuit court know the practices of that court. As this Court explained in *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 73 S. Ct. 656 (1953), "[i]t is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice – whatever it may be . . . " *Id.* 345 U.S. at 260-61, 73 S. Ct. at 663. (Although rejecting the petitioner's challenge to the circuit court's en banc procedures, the Court remanded for the appellate court to make clear the procedure to be followed in seeking and responding to requests for en banc hearings. *Id.* 345 U.S. at 268, 73 S. Ct. at 666.) Whatever the procedure might be in the Eighth Circuit and other circuits for accomodating the pressures resulting from increased appellate case loads with the appellate courts' lawmaking functions, that procedure should be made clear to the public and the litigants who appear before the court. Accordingly, this Court should grant review to ensure that the circuit courts, in their efforts to adopt innovative procedures to provide justice to an expanding number of litigants, do not do so in a manner that undermines the statutorily protected right of a direct appeal.[3]

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[3] Other cases cited by the government also provide examples of appropriate exercises of this Court's supervisory powers. For instance, in *Taylor v. McKeithen*, 407 U.S. 191, 92 S. Ct. 1980. 32 L.Ed.2d 648 (1972), the Court, while fully recognizing the "wide latitude" of the circuit courts on "whether or how to write opinions," granted certiorari, vacated the judgment and remanded the case to the court of appeals so that it could explain the reasons for reversal without opinion. *Id.* 407 U.S. at 194, n.4.

CONCLUSION

For all the foregoing reasons, as well as those presented in Dr. Abi-Ghanem's petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the questions presented in the petition.

Respectfully submitted,

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